IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

OKLAHOMA ENTERTAINMENT SERVICES, LTD.,

Plaintiff,

v.

DONALD D. GROSE, Acting District Director of the Oklahoma City District Office of the United States Small Business Administration, and the UNITED STATES SMALL BUSINESS ADMINISTRATION, an agency of the United States Government,

Defendants.

Civil Action No. 78-C-404-C

STIPULATION OF DISMISSAL

Come now the parties in the above-styled and numbered cause and pursuant to Rule 41(a)(1), F.R. Civ. P., and hereby stipulate that the above-entitled cause shall be and is dismissed with prejudice to the refiling of same against all defendants.

DATED this 31st day of December, 1979.

JAMES E. GREEN, JR.
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2654

Attorney for Plaintiff

ROBERT P. SANTEE
Assistant U. S. Attorney
Attorney for Defendants

79

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. ABBIE G. TAYLOR, a/k/a ABBIE TAYLOR, a/k/a ABBIE GAIL TAYLOR, Defendant.	)	CIVIL ACTION NO. 79-C-515-C

DEFAULT JUDGMENT

This matter comes on for consideration this 28th day of December, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Abbie G. Taylor, a/k/a Abbie Taylor, a/k/a Abbie Gail Taylor, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Abbie G. Taylor, a/k/a Abbie Taylor, a/k/a Abbie Gail Taylor, was personally served with Summons and Complaint on August 17, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Abbie G. Taylor, a/k/a Abbie Taylor, a/k/a Abbie Gail Taylor, for the sum of $652.30 as of June 14, 1979, with interest thereafter at 7% per annum until paid, less the sum of $50.00 paid on such debt on September 5, 1979.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES W. JENKS,

Plaintiff,

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education, and Welfare,

Defendant.

No. 79-C-416-C

FILED

DEC 28 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

At the time of the hearing on November 29, 1978 before the Administrative Law Judge, the claimant appeared personally and testified but was not represented by legal counsel, although a National Service Officer of the Disabled American Veterans did accompany claimant to the hearing (Tr. 27).

In his decision the Administrative Law Judge concluded "that claimant's medically determinable condition does not meet the listings, nor is claimant's condition sufficiently severe so as to preclude all substantial gainful activity for a period of twelve consecutive months." (Tr. 16) In his findings Nos. 5 and 6 the Administrative Law Judge found that claimant's condition was not "of sufficient severity as to preclude all substantial gainful activity" * * * and that "claimant retains the functional capacity to engage in his usual occupation as an aircraft assembler." (Tr. 17)

In Dr. Vincent B. Runnells, M. D.'s report dated May 26, 1978 he states that "X-rays of the lumbar spine show some moderate spondylosis". Dr. Runnels further states that

in his opinion the claimant "has cervical and lumbar spondylosis but without true nerve route compression." * * * "Has chronic anxiety and depression," * * * and "Chronic obstructive lung disease * * *". Dr. Runnels further states "I doubt that any one thing is disabling but when his entire picture -- medical, emotional and spine -- is considered, he may well be disabled." (Tr. 147-148) Further reports of Dr. Runnels found on Pages 166, 168 and 170 of the transcript indicate that in Dr. Runnels' opinion the claimant is disabled to the extent that he is not capable of "any gainful employment".

On Page 139 of the transcript is a report from Dr. Selwyn A. Willis, M. D. dated November 7, 1977. In his report Dr. Willis concludes that the claimant "could not return to his usual position at Douglas." Also contained in the transcript at Page 134 is a report from R. F. Tenney, M. D. dated July 1, 1977 in which Dr. Tenney states that from his examination "the lumbar flexion was normal and straight leg raising test was negative. Cervical range of motion was normal but with maximum extension of reported pain in the lumbar area." Dr. Tenney reported that other tests which he made were normal and that from his review of the claimant's X-rays, "No evidence of significant disc herniation was detected." Dr. Tenney concluded that there was "no evidence of nerve route compression" and that the claimant's "low back syndrome was improving." Dr. Tenney did advise the claimant "to avoid bending and lifting" and felt that claimant "could return to work."

At the hearing the Administrative Law Judge commented that the plaintiff was "shaking an awful lot." The plaintiff and the plaintiff's wife stated that this was not unusual. (Tr. 50 and 53).

Plaintiff testified that he was 47 years of age and had a tenth grade education; that he could read but could "hardly write any more;" that his last employment was with McDonnell Douglas as an aircraft assembler; that he last worked on April 13, 1977 at which time he entered the hospital with back problems; that he did have a drinking problem in the past but that he was doing all right at the present time; that he had a drink of beer once in a while; and that he was under the care of Dr. Runnells.

Mrs. Jenks testified that the claimant shakes so bad that he can't hold a cup of coffee; that he has to be helped with putting his clothes on; that he can't button his sleeves or his shirt; is not able to cut wood, cannot operate a chain saw, loses his balance, cannot fish or hunt; that he has to be helped in and out of the truck; that he is short of breath, that he is physically unable to drive an automobile and that he did lose his license on a D.W.I. conviction "quite sometime ago."

The principal evidence in the record to support the Administrative Law Judge's decision is the report of Dr. Tenney found on Page 134 of the transcript. The Administrative Law Judge mentions but does not elaborate on the significance of medical evidence supplied by Dr. Runnells and Dr. Willis, nor on the testimony of the plaintiff and plaintiff's wife and the lay witnesses' statements found on Pages 163, 164 and 165 of the transcript insofar as such evidence may be relevant to plaintiff's disability claim commencing with the period of time following Dr. Tenney's examination of May 20, 1977. Although Dr. Tenney concludes that the plaintiff can return to work he does state that the claimant should avoid bending and lifting which apparently is inconsistent with plaintiff's job requirements at Douglas Aircraft.

Since the Administrative Law Judge determined that the claimant last met the special earnings requirements on September 30, 1978, it is necessary to determine whether claimant's disability was sufficiently severe so as to preclude his engaging in work activities for a continuous period of not less than twelve months prior to September 30, 1978. With the exception of Dr. Tenney's report based on his one examination of the plaintiff on May 20, 1977, the medical and lay testimony tends to support plaintiff's claim of disability sufficient to preclude his returning to his former employment. It would be helpful to this Court in reviewing plaintiff's claim if the Administrative Law Judge would make specific findings as to whether plaintiff was disabled at any time following Dr. Tenney's examination of May 20, 1977 and September 30, 1978 based on the medical and lay evidence in the record following the date of Dr. Tenney's examination in May of 1977. It would also be helpful if the record before the Administrative Law Judge included evidence touching on plaintiff's vocational capabilities to perform light or sedentary jobs if it is determined he is not capable of returning to his former employment and if it is determined that plaintiff was so disabled for a period of twelve months prior to September 30, 1978.

IT IS, THEREFORE, ORDERED that the case be and is hereby remanded to the Administrative Law Judge for the purpose of making additional findings as suggested herein and for the additional purpose of including in the record additional evidence touching on plaintiff's vocational capabilities to perform light or sedentary jobs.

Dated this 28th day of December, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UTICA NATIONAL BANK & TRUST COMPANY, a National Banking Association,	)	
Plaintiff,	)	
vs.	)	No. 79-C-226-~~B~~ E
THREE S CATTLE COMPANY, a Co-Partnership, ROLAND STEWART, Individually and as a Partner, FLYNN W. STEWART, Individually and as a Partner, and FLYNN W. STEWART II, Individually and as a Partner,	)	
Defendants.	)	

FILED
DEC 28 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

MONEY JUDGMENT BY CONSENT

Now on this 28th day of December, 1979, the Court having reviewed the Entry of General Appearance and Consent to Money Judgment filed herein by all defendants,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff recover, jointly and severally, of the defendants, Three S Cattle Company, a co-partnership, Roland Stewart, individually and as a partner, Flynn W. Stewart, individually and as a partner, and Flynn W. Stewart II, individually and as a partner, the sum of $125,000.00, together with $1,406.25 in interest on said sum for the period from July 1, 1978 through September 30, 1978, $ 15,625.00 in interest on said sum for the period from October 1, 1978 through this date, for a total sum of $ 142,031.25, together with interest on said total sum as provided by law at the rate of 10% per annum until paid, and together with attorneys' fees in the amount of $12,520.00, and the costs of this action.

/s/ H. Dale Cook
United States District Judge

APPROVED:

THREE S CATTLE COMPANY
A Co-Partnership

By _____
Roland Stewart, Partner

By _____
Flynn W. Stewart, Partner

By _____
Flynn W. Stewart II, Partner

_____
Roland Stewart, Individually
and as a Partner of Three S
Cattle Company

_____
Flynn W. Stewart, Individually
and as a Partner of Three S
Cattle Company

_____
Flynn W. Stewart II, Individually
and as a Partner of Three S
Cattle Company

BANNER, McINTOSH & DOBBS

By _____
Jack Banner

Attorneys for Defendants

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
WILLIAM C. ANDERSON
KATHLEEN REINBOLT

By _____
William C. Anderson

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

FARAN PETROLEUM CORPORATION, an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	No. 79-C-363-C
AMCOLE ENERGY CORPORATION, a foreign corporation, FARGO ENERGY CORPORATION, a foreign corporation, INTRAMERICAN ENERGY CORPORATION, a foreign corporation,	)	
Defendants.	)	

ORDER

It appearing to the Court that the above-entitled action has been fully settled, adjusted and compromised, and based on stipulation; therefore,

IT IS ORDERED AND ADJUDGED that the above-entitled action be, and it is hereby, dismissed, without additional costs to any party, each party to bear its own costs, and with prejudice to the Plaintiff and to Defendant, INTRAMERICAN ENERGY CORPORATION, on its Cross-claim and Counter-claim.

DATED this 28th day of December, 1979.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

HUFF TEEMAN and MARY TEEMAN, Plaintiffs	)	
v.	)	No. 78-C-588-E
FRED E. STONEMAN, d/b/a STONEMAN FORD, Defendants	)	

FILED

DEC 28 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

DISMISSAL

Come now the plaintiffs and by mutual consent of the defendants and with the knowledge and approval of the Court, do hereby dismiss their cause of action with prejudice to the bringing of any future actions.

CHAPEL, WILKINSON, RIGGS, ABNEY
& KEEFER

By Bill Wilkinson

Bill V. Wilkinson
502 West Sixth
Tulsa, Oklahoma 74119
Attorneys for plaintiffs

APPROVED:

George Briggs

George Briggs
Attorney for defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA
CLERK'S OFFICE
UNITED STATES COURT HOUSE
TULSA, OKLAHOMA 74103

JACK C. SILVER
CLERK

December 28, 1979

Mr. Wesley E. Johnson
1310 S. Denver
Tulsa, OK 74119

Re: Case No. 79-C-735-C, William C. A. Harper vs. Dept. of Corrections.

Dear Mr. Johnson:

This is to advise you that the following minute order was entered this date in the above case by U. S. District Judge H. Dale Cook:

It is Ordered by the Court that the Petitioner's Application for Injunctive Relief is hereby denied, based on the prospective allegations.

Very truly yours,

JACK C. SILVER, CLERK

Deputy

Mr. Johnson notified by Helen.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN

DISTRICT OF OKLAHOMA

JOYCE DOLLARHYDE, Adm. of the Estate of DONALD RAY DOLLARHYDE, JOYCE DOLLARHYDE, VELISHA DOLLARHYDE, A minor, DONNIE DOLLARHYDE, a minor, MARTIN DOLLARHYDE, a minor, DOROTHY DOLLARHYDE, a minor, all said minors by and through JOYCE DOLLARHYDE, their next friend,

Plaintiffs,

-vs-

NORTHEAST OKLAHOMA ELECTRIC COOPERATIVE, an Oklahoma Corporation,

Defendant.

NO. 79-C-349-GBT

JOINT APPLICATION FOR DISMISSAL

COMES NOW the Plaintiffs and the Defendant by and through their respective attorneys and show to the Court that the above and foregoing matter has been disposed of by agreement to settle and that both parties request the Court to enter its Order dismissing the cause of action with prejudice to any future action.

HENRY, WEST & SILL

Joyce Dollarhyde
JOYCE DOLLARHYDE

By _____
Attorneys for Plaintiff

GIBBON, GLADD, TAYLOR, SMITH & HICKMAN, P.A.

By _____
Richard D. Gibbon
Attorney for Defendant

O R D E R

This matter comes on before the Court on the above and foregoing application for dismissal; the Court being fully advised in the premises that the matter has been completely disposed of dismisses the above and foregoing cuase of action with prejudice to any future action.

_____
JUDGE OF THE UNITED STATES DISTRICT COURT

13.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM CLAUDE WESTON, individually, and as Successor-Executor of the Estate of JOHN J. WESTON, Deceased, Plaintiff, -vs- EVERETT E. BERRY, ROBERT M. MURPHY, and LYNN OSBORN, Defendants.	)	NO. 77-C-429-D

FILED

DEC 27 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties and jointly stipulate and agree that Plaintiff's cause should be dismissed with prejudice and respectfully requests this Honorable Court to make and enter its Order of Dismissal with Prejudice.

Done and dated this 20th day of December, 1979.

William Claude Weston
William Claude Weston,
individually, and as Successor-
Executor of the Estate of
John J. Weston, Deceased

Gloria T. Svanas

David Peterson
Attorneys for Plaintiff

Everett E. Berry
Everett E. Berry, Defendant

Robert M. Murphy
Robert M. Murphy, Defendant

Lynn Osborn
Lynn Osborn, Defendant

Wm. S. Hall
Wm. S. Hall, Attorney for
Defendants Everett E. Berry,
Robert M. Murphy and Lynn Osborn

James O. Ellison, Attorney for
Defendant Everett E. Berry

ORDER OF DISMISSAL WITH PREJUDICE

The Court being fully advised in the premises and upon consideration of the above and foregoing stipulation finds that Plaintiff's cause should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED be and the same is hereby dismissed with prejudice.

Done and dated this 27 day of Dec., 1979.

S/ FRED DAUGHERTY

Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANK KINNEY EXUM, Petitioner Pro Se, vs. AL C. PARKE, Warden, Joseph Harp Correctional Center, and THE STATE OF OKLAHOMA, et al., Respondents.	)	No. 79-C-677-BT

ORDER

The Court now considers the petition by Frank Kinney Exum challenging the validity of his conviction in Osage County District Court pursuant to Title 28 U.S.C. §2254.

Petitioner was convicted of the offense of Uttering Two or More Bogus Checks Exceeding Twenty ($20.00) Dollars, After Former Conviction of a Felony, pursuant to 21 O.S.1971, §51, and punishment was fixed at 30 years.

In an unpublished opinion rendered April 17, 1979, by the Court of Criminal Appeals for the State of Oklahoma, No. F-77-677, Petitioner's conviction was affirmed, but his sentence was modified from 30 years imprisonment to ten years imprisonment.

Petitioner argues:

(i) The State failed to prove, beyond a reasonable doubt, every element of the offense charged, in violation of the rights guaranteed petitioner under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the holdings in Jackson v. Virginia, 47 LW 4883 (June 28, 1979); and

(ii) The Trial Court erred in admitting evidence relating to offenses other than the offense of which petitioner was charged, in violation of Petitioner's rights guaranteed him under the Fourteenth Amendment to the United States Constitution.

In Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the Supreme Court laid down the test applicable to a

determination of whether the petitioner was entitled to an evidentiary hearing, as follows:

> "....[I]f (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

In reviewing the record (including the trial transcript and exhibits), the Court finds an evidentiary hearing is not necessary.

Although plaintiff has not filed an application for post conviction relief pursuant to 22 O.S.A. §1080 et seq., it appears from the record that the claims presented to this Court were presented to the Oklahoma Court of Criminal Appeals on direct appeal and found to be without merit. The Supreme Court of the United States has held that once the substance of a federal habeas corpus claim has been "fairly presented" to the state courts, the exhaustion requirement has been satisfied. Picard v. Connor, 404 U.S. 270 (1971). See also, Sandoval v. Rodriguez, 461 F.2d 1097 (10th Cir. 1972); Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968), cert. denied 394 U.S.950 (1969). The Respondents, in their response to the Show Cause Order issued by this Court, have conceded that the issues raised are identical and, therefore, no necessity exists requiring exhaustion of post-conviction relief.

The evidentiary facts have been delineated by the Oklahoma Court of Criminal Appeals in their opinion and need not be reiterated in this Order.

Petitioner's first complaint is directed to the two checks which formed the basis of the Information by which he was charged. He contends: (i) The checks were written for merchandise; (ii) Each merchant was given proper identification and that petitioner had some conversation with each of the two merchants as to the validity of the checks; (iii) The two checks were never presented and dishonored; (iv) His account at the bank

was closed without notification; (v) Petitioner believed his account was open and that $1,000 had been deposited thereto by a business associate; (vi) No testimony was introduced by the State to show that the Petitioner had a felonious intent when he wrote the two checks and that felonious intent is a critical element of the offense charged. Contentions (i) through (v) are merged in the contention as to felonious intent.

Two checks formed the basis of the charges against the petitioner, one in the amount of $13.20, which was returned and dishonored by the drawee bank; and one in the amount of $15.61, which was not deposited to the payee's account based on a suspicion the check was "bogus."

Petitioner was charged with the crime of Obtaining Money by Bogus Check, pursuant to 21 O.S. 1971, §1451.3, which provides:

> "Any person making, drawing, uttering or delivering two or more false or bogus checks, drafts, or orders, as herein defined, the total sum of which checks exceeds Twenty Dollars ($20.00), even though each separate instrument is written for less than Twenty Dollars ($20.00), all in pursuance of a common scheme or plan to cheat and defraud, shall be deemed guilty of a felony and shall be punished by imprisonment in the State Penitentiary, for a term not less than one (1) year nor more than ten (10) years, or by a fine not to exceed Five Thousand Dollars ($5,000.00), or both such fine and imprisonment." (Emphasis supplied)

False or bogus checks are defined in 21 O.S.Supp.1975, §1541.4 as follows:

> "The term 'false or bogus check or checks' shall include checks or orders which are not honored on account of insufficient funds of the maker to pay same, or because the check or order was drawn on a closed account or on a nonexistent account when such checks or orders are given in exchange for any benefit or thing of value, as against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud or the knowledge of insufficient funds in, or credit with, such bank or other depository; provided, such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with the protest fees, within five (5) days from the date the same is presented for payment; and provided, further, that said check or order is presented for payment within thirty (30) days after same is delivered and accepted." (Emphasis supplied)

After reviewing the transcript of the trial and the exhibits introduced it is apparent that (i) the petitioner opened his initial checking account with the sum of $100 and the next day wrote five checks; (ii) some three days after the account was opened, petitioner wrote a check for $150 which was returned for insufficient funds; (iii) the bank closed his account because of the number of insufficient checks being presented for payment; (iv) when the bank closed the account the balance was 87 cents; (v) the bank records reveal that checks totaling $705.40 were presented to the bank for payment on petitioner's account after the account had been closed; (vi) the bank sent notice of closing the account to the address petitioner had given them when he opened the account. The Court is aware of the petitioner's contention as to the $1,000 deposit to be made and his lack of knowledge that the account had been closed.

The Oklahoma Court of Criminal Appeals found because the two checks were written after petitioner's account was closed that they fell within the following definition of §1541.4, to-wit:

> "....[o]r because the check or order was drawn on a closed account or on a nonexistent account when such checks were given in exchange for money or property or in exchange for any benefit or thing of value,...."

The Court further found it was not the intent of the Legislature that "dishonorment" by the drawee bank was a condition precedent to finding a violation of §1541.3. The Court found the intent of the Legislature "[w]as to recognize a prima facie case of intent to defraud once it had been shown that the checks fell within one of the three classifications of a bogus check" but this did not preclude the State from proving this element by other recognized forms of evidence [i.e.,circumstantial evidence].

The standard of review for Federal Courts in Habeas Corpus proceedings (§2254) was recently stated in Jackson v. Virginia, supra. The Court said, in discussing the case of In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970):

> "....[I]n short, Winship presupposes as an essential element of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."

The Respondent argues and is apparently correct that paragraphs (i) through (vi) delineated above, evidence a disagreement by petitioner with the interpretation given §1541.4 by the Oklahoma Court of Criminal Appeals.

Generally, the interpretation of a state statute by the highest court of the State will be followed by the federal courts unless that interpretation is inconsistent with fundamental principles of liberty and justice. Goldsmith v. Cheney, 447 F.2d 624, 627 (10th Cir. 1971); Bond v. State of Oklahoma, 546 F.2d 1369, 1377 (10th Cit. 1976); Pierce v. State of Oklahoma, 436 F. Supp. 1026, 1032 (USDC WD Okl.1977); Hughes v. State of Oklahoma, 426 F.Supp.36, 40 (USDC WD Okl. 1976); Tyrell v. Crouse, 422 F.2d 852, 853 (10th Cir. 1970); Chavez v. Baker, 399 F.2d 943 (10th Cir. 1968), cert. denied 394 U.S. 950 (1969).

The Court further finds the record is not entirely lacking in evidence to support the charge so as to demonstrate denial of due process. The Court further finds the evidence in the record is more than sufficient to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense charged. The Court finds no constitutional infirmity in the State Court conviction.

The Court, therefore, finds that the first ground for relief of petitioner is without merit.

Petitioner next complains of the admission of evidence as to "other crimes" and testimony relating to other checking accounts, which the petitioner claims are irrelevant to the "bogus" check charges here under consideration.

The Oklahoma Court of Criminal Appeals found the testimony was relevant to show motive, intent, lack of mistake or accident and a common scheme or plan and was, therefore, admissible.

The Court finds if there were error in the admission of evidence, such error does not rise to the dignity of a constitutional error. Donnelly v. De Christoforo, 416 U.S. 637, 40 L.Ed.2d 431, 94 S.Ct.1868 (1974).

Errors committed by the trial court with respect to the admission of evidence can only be reviewed by appeal. Young v. State of Oklahoma, 428 F.Supp. 288, 293 (USDC WD Okl.1976); Bond v. State of Oklahoma, supra, 546 F.2d 1369, 1377 (10th Cir. 1976).

The Court, therefore, finds that petitioner's second ground for relief is without merit.

For the foregoing reasons, the Petition of Frank Kinney Exum for Writ of Habeas Corpus under Title 28 U.S.C. §2254 will be denied.

IT IS SO ORDERED this 21th day of Dec., 1979.

Thomas R. Brett

THOMAS R. BRETT
United States District Judge

AK/ji
12/21/79

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LEXINGTON INSTRUMENTS, a corporation, Plaintiff,	)	
vs.	)	Civil Action No. 77-C-316-B
DURWARD WATSON, d/b/a MIDWEST MEDICAL INSTRUMENTATION, Defendant.	)	Filed Dec 27, 1979

J U D G M E N T

on December 18, 1979

THIS action came on for trial before the Court, the Honorable Thomas R. Brett, District Judge, presiding. Plaintiff announced ready and the Defendant appeared neither in person nor by counsel. Thereupon Plaintiff orally moved for a default judgment against the Defendant. The Court being fully advised herein, finds that the pre-trial Order and the Interrogatory Answers filed herein indicate that the allegations in Plaintiff's Petition shall be taken as true and confessed as against the Defendant. The Court further finds that insofar as Defendant's Counterclaim, judgment should be awarded to the Plaintiff on said Counterclaim. The Court further finds that an attorney's fee in the sum of $3,500.00 is a reasonable fee.

IT IS ORDERED AND ADJUDGED that the Plaintiff, LEXINGTON INSTRUMENTS, recover of the Defendant, DURWARD WATSON, d/b/a MIDWEST MEDICAL INSTRUMENTATION, the principal sum of $14,345.57, with interest thereon at the rate of 12% per annum as provided by law, together with an attorney's fee in the sum of $3,500.00 and all the costs of this action.

IT IS FURTHER ORDERED AND ADJUDGED that insofar as Defendant's Counterclaim, that judgment be rendered for the Plaintiff on the Defendant's Counterclaim.

DATED this 27th day of December, 1979.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

LAW OFFICES
UNGERMAN
CONNER,
LITTLE
UNGERMAN &
GOODMAN

1710 FOURTH NATIONAL
BANK BUILDING

TULSA, OKLAHOMA
74119

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DYER CONSTRUCTION COMPANY, an Oklahoma corporation, Plaintiff, vs. FORT SMITH STRUCTURAL STEEL COMPANY, an Arkansas corporation, and CONTINENTAL NATIONAL AMERICAN (CNA), an Illinois corporation, Defendants.	)	No. 79-C-703-B

FILED
DEC 21 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Now on this 21 day of December, 1979, I, the undersigned Judge of the United States District Court for the Northern District of Oklahoma, do, upon joint application of the parties hereto, enter this Order dismissing plaintiff's actions pending herein against the defendants and each of them, with prejudice to refiling same.

JUDGE OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

NEVA CILUFFO, Plaintiff, -vs- KIN-ARK CORPORATION, Defendant.	)	Civil Action No. 78-C-451-C

Filed 12-21-1979

JOINT STIPULATION OF
DISMISSAL WITH PREJUDICE

COMES NOW the parties and show to the Court that they have entered into a stipulation agreement concerning all matters herein and Plaintiff therefor dismisses her cause filed herein with prejudice and the parties jointly stipulate and agree and request this Honorable Court to make and enter its Order of Dismissal With Prejudice.

NEVA CILUFFO, PLAINTIFF
DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON

By _____
Sam G. Bratton II
1200 Atlas Life Building
Tulsa, Oklahoma 74103
Attorneys for Plaintiff

KIN-ARK CORPORATION, DEFENDANT
FELDMAN, HALL, FRANDEN,
REED & WOODARD

By _____
Wm. S. Hall
816 Enterprise Building
Tulsa, Oklahoma 74103
Attorneys for Defendant

ORDER OF DISMISSAL WITH PREJUDICE

The Court being fully advised in the premises and on consideration of the above and foregoing stipulation of the parties finds that the following Order should issue.

BE IT THEREFORE ORDERED, ADJUDGED and DECREED by the Court that Plaintiff's cause be and the same is hereby dismissed with prejudice.

Done and dated this 20th day of December, 1979.

/s/ H. Dale Cook
H. Dale Cook
Chief U. S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ALVIN D. MAYBERRY,

Plaintiff,

vs.

AKRON RUBBER MACHINERY CORPORATION, a corporation, and UNIROYAL, INC., a corporation,

Defendants.

No. 79-C-34-BT

JUDGMENT

This Court having this date sustained the defendants' Motions for Summary Judgment,

IT IS HEREBY ORDERED that Judgment be entered in this action in favor of the defendant, Uniroyal, Inc., and Akron Rubber Machinery Corporation, and against the plaintiff, Alvin D. Mayberry.

ENTERED this 20th day of December, 1979.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MILDRED WATTS, d/b/a C&C ALUMINUM PRODUCTS COMPANY, Plaintiff,	)	
v.	)	No. 79-C-485-C
SOUTHWESTERN BELL TELEPHONE COMPANY, a Missouri corporation, Defendant.	)	

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED by and between plaintiff, Mildred Watts, d/b/a C&C Aluminum Products Company, and defendant, Southwestern Bell Telephone Company, a Missouri corporation, as follows:

1. That the parties have settled and compromised the above-styled cause.

2. That the above-styled cause is dismissed with prejudice as to any future action, each party to bear its own costs.

DATED this 19 day of December, 19 79

SOUTHWESTERN BELL TELEPHONE COMPANY

By Thomas J. Enis

THOMAS J. ENIS, Its Attorney
707 N. Robinson, Room 921
Oklahoma City, Oklahoma 73102
Telephone: 405/236-6751

MILDRED WATTS, d/b/a C&C ALUMINUM PRODUCTS COMPANY

By Mildred Watts

Mildred Watts, Plaintiff

By Bert M. Grigg

Bert M. Grigg,
Attorney for Plaintiff
512 Mayo Building
Tulsa, Oklahoma 74103
Telephone: 918/587-0227
918/582-7632

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GENE L. HART, Plaintiff,	)	
vs.	)	No. 79-C-141-C
SIDNEY D. WISE, et al., Defendants.	)	

DEC 1 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

The Court now considers plaintiff's Motion for Substitution of Parties. Title 42 U.S.C. §1988 provides that civil rights actions under Title 42 (as in this action) are subject to applicable state law where federal law is deficient or "not adapted to the object". From this, survivorship is determined by the law of the state in which the District Court is located. Pritchard v. Smith, 289 F.2d 153, 88 A.L.R.2d 1146 (5th Cir. 1961). The parties herein agree to this, and further agree that the applicable Oklahoma statute for survivorship is Title 12, Okla.Stat.Annot. §1051, which states:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

Plaintiff concedes, and it is true, that at common law all actions abated at the death of the person injured. Black v. Cook, 444 F.Supp. 61 (W.D.Okla. 1977). Plaintiff argues that perhaps the phrase "injury to the person" is an applicable exception to abatement, and states that he was unable to find any Oklahoma authority holding that civil rights actions did not involve injuries to the person.

As noted by defendant, this Court has the advantage of

a Western District of Oklahoma case that is on point. Black v. Cook, supra, held that §1051 did not provide for survival of civil rights actions, and that absent statutory exception, the action abated. Plaintiff argues that Black v. Cook was dismissed for failure to state a claim, and that the court merely "commented that 12 O.S. 1051, permitting a survival of actions at common law, should be interpreted to exclude a properly brought federal civil rights action..." In this Court's reading of Black v. Cook, the discussion of survival of the action was more than a comment; it was a ruling on an alternate ground for dismissing the action. While it is not binding on this Court, it is persuasive and will be followed.

The Fifth Circuit handed down a ruling in 1977 that is directly opposed to the Black v. Cook decision, holding that a state survivorship law that abated an already-in-progress civil rights action was contrary to the purpose of federal civil rights laws, and was therefore inapplicable. Shaw v. Garrison, 545 F.2d 980 (5th Cir. 1977). As plaintiff notes, Shaw further held that a §1983 action survived under federal common law. Id. at 984. Shaw makes a persuasive argument on all but the most important point -- that abatement of §1983 actions upon the death of the injured party is inconsistent with the purpose of the legislation. The only evidence Shaw offers of Congressional intent regarding §1983 and abatement is in the following passage:

> Because Louisiana's survivorship provisions would cause Shaw's pending civil rights action to abate, we find that Louisiana law is inconsistent with the broad remedial purposes embodied in the Civil Rights Acts -- law designed to insure to all citizens "the right to be free from deprivation of constitutional civil rights."

Id. at 983. The court did not explain how the survival of that action would help insure that the deceased Mr. Shaw would be free from deprivation of constitutional civil rights. It is conceivable that the court was acting on the belief that the purpose of §1983 was to secure civil rights

by punishing those who violated them, although this theory is not stated. Such a belief would mandate the survival of §1983 actions, but it is unlikely that such was the intent of Congress for §1983. It is a civil remedy for personal recovery of damages or for injunctive relief. Neither would be served after the death of the party aggrieved. Moreover, the punishment for deprivation of civil rights under color of law is covered by Title 18 U.S.C. §242.

At any rate, the 5th Circuit's stated or unstated theories in Shaw were unsuccessful. Shaw v. Garrison was reversed by the Supreme Court in Robertson v. Wegmann, 436 U.S. 534, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978), and plaintiff's arguments in the instant case must similarly fail.

It is therefore ordered that plaintiff's Motion for Substitution of Parties be overruled, and this action be dismissed pursuant to Rule 25, Federal Rules of Civil Procedure.

It is so Ordered this 18th day of December 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK COMPANY, a Delaware Corporation, Plaintiff,	)	
v.	)	NO. 79-C-678-C
ATLAS ENTERPRISES, INC., a Pennsylvania Corporation, Defendant.	)	

DEC 1 1979

JACK C. SILVER, CLERK
U. S. DISTRICT COURT

JUDGMENT

THIS ACTION was considered by the Court on the 9th day of December, 1979, on Application of the Plaintiff for the Entry of default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure; it appearing to the Court that the Complaint in this action was filed on November 15, 1979, that Summons and Complaint were duly served on the Defendant as required by law, it further appearing to the Court that Defendant has wholly failed to enter its appearance in the action or otherwise plead, and has defaulted, and it further appearing that default was entered against the Defendant on December 18, 1979, by the Court Clerk, and that no proceedings have been taken by Defendant since entry of his default.

The Court, having reviewed the pleadings, Exhibits and Affidavits on file finds:

1. That the Defendant is in default.

2. That Plaintiff is entitled to default judgment in its favor, for the relief prayed for.

3. That Plaintiff is the prevailing party and thereby entitled to an attorney fee award pursuant to Title 12, Oklahoma Statutes, Section 936.

4. That the Court finds, based upon Affidavits on file in the action, a reasonable attorney fee for Plaintiff is $ 4000 00 .

IT IS ORDERED AND ADJUDGED BY THE COURT, that Plaintiff, John Zink Company, recover of Defendant, ATLAS ENTERPRISES, INC., judgment

in the sum of $13,780.00, with 18% per annum on said sum from June 29, 1979 until December 18, 1979, and with interest on the judgment at the rate of 18% per annum from December 18, 1979 until said judgment is satisfied, in accordance with Title 12, Oklahoma Statutes, Section 727(1) and all costs expended in the action.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT, that Plaintiff, John Zink Company, recover of Defendant, ATLAS ENTERPRISES, INC., judgment for reasonable attorney fees in accordance with Title 12, Oklahoma Statutes, Section 936, determined by the Court to be the sum of $ 4000 00.

/s/ H. Dale Cook
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EARL CLINTON SALYERS, Plaintiff, vs. BRYON L. GRUBB and GARY GRUBB, Defendants.	No. 78-C-382
LEWIS LEON RAPE, Plaintiff, vs. BRYON L. GRUBB and GARY GRUBB, Defendants.	No. 78-C-383
LAHOMA SALYERS, Plaintiff, vs. BRYON L. GRUBB, and GARY GRUBB, Defendants.	No. 78-C-384
ADEAN L. RAPE, Plaintiff, vs. BRYON L. GRUBB and GARY GRUBB, Defendants.	No. 78-C-385 CONSOLIDATED

ORDER OF DISMISSAL

ON This 17th day of December, 1979, upon the written application of the parties for A Dismissal with Prejudice of the Complaint and all causes of action, the court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have

requested the Court to dismiss said Complaint with prejudice to any future action.

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

FRANK M. HAGEDORN,

Attorney for Plaintiffs,

ALFRED B. KNIGHT,

Attorney for the Defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH W. DAVIS, JR., Plaintiff, vs. ERNEST ERDMANN, Port Director (Port of Tulsa, Oklahoma, BUREAU OF CUSTOMS DEPARTMENT OF THE TREASURY, and REX B. DAVIS, Director of Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Defendants.	)	No. 75-C-356-C

J U D G M E N T

In accordance with the Judgment entered herein on October 15, 1979 by the United States Court of Appeals for the Tenth Circuit, this Court's Order and Judgment dated March 20, 1979 are hereby vacated, and it is ordered that Judgment be entered in favor of the plaintiff and against the defendants.

It is the further Order of the Court that the defendants issue the necessary permit to require immediate delivery of the "knife-pistol" to the plaintiff.

It is so Ordered this 19th day of December, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IONA HOGAN,

Plaintiff,

v.

JOSEPH A. CALIFANO, JR., Secretary of Health, Education and Welfare,

Defendant.

No. 78-C-536-C

FILED

DEC 18 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education, and Welfare denying her disability benefits provided for in Section 216 and 223 of the Social Security Act, as amended, 42 U.S.C. §§416, 423. She asks that the Court reverse this decision and award her the additional benefits she seeks.

The matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued June 22, 1978. The Administrative Law Judge found that plaintiff was only entitled to disability benefits under Sections 216 and 223 of the Social Security Act, as amended, from February 1976 to November 1977. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on August 22, 1978, issued its findings that the decision of the Administrative Law Judge was correct and that further action by the Council

would not result in any change which would benefit the plaintiff. Thus, the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education, and Welfare.

Plaintiff contends that the Secretary's decision is incorrect and that the record supports her claim of continued disability. The Secretary's denial was predicated on his finding that by November, 1977, the plaintiff's orthopedic and gastrointestinal problems were no longer severe enough to be considered disabiling under the Act.

In her "Application for Disability Insurance Benefits" plaintiff states that her disability consists of "Degenerating Arthritis in Spine, Alkaline Reflux Gastrontis, and Hypoglycemia" and that she became unable to work due to her disability on February 1, 1976. (Tr. 73).

There is no dispute about plaintiff's disability from her alleged onset date in February 1976 until November 1977, when the Secretary determined plaintiff had regained the capacity for sedentary work. Basically, plaintiff was awarded benefits because during that period the combined effect of her various problems prevented her from working.

The medical evidence supporting the Secretary's termination of plaintiff's benefits consists of a November 11, 1977 medical report from Dr. Robert T. Rounsaville, a Diplomat of the American Board of Orthopedic Surgery (Tr. 173-174, 182). Dr. Rounsaville's physical examination of plaintiff revealed that Plaintiff had a normal range of flexion extension, and lateral bending of her lumbar spine; that there was no limitation of motion, nor any muscle spasm; and that the reflexes and sensory examinations were also within normal limits (Tr. 173). His examination of the cervical spine also revealed a normal range of motion and that she had

normal reflexes and sensation in her arms. Although plaintiff complained that her knees were swollen, Dr. Rounsaville found no swelling or puffiness, and he concluded that her knees were also normal. He did note that the joints in plaintiff's hands were puffy, but there were no deformities in those joints. In addition, plaintiff had a normal range of hand motion and normal grip in both hands. Dr. Rounsaville concluded that plaintiff only had mild arthritis in her hands. The doctor did not think plaintiff was disabled from doing her normal employment (Tr. 174).

The evidence offered by plaintiff to support her claim of continued disability consists of two reports from her osteopath, David S. James (Tr. 186-188). Dr. James reported on January 16, 1978, and on May 11, 1978, that plaintiff was "significantly disabled at this time" . . ."unable to carry out gainful employment," and "having great difficulty functioning in her daily activities at home." (Tr. 186-188).

A vocational expert, Dr. Minor W. Gordon, testified at the May 8, 1978 hearing (Tr. 45-53). Dr. Gordon testified that he had reviewed all of the exhibits in the case and had heard the testimony of the claimant; that in his opinion there were jobs which the claimant could do and which would be consistent with her age, education and prior work activities including numerous light and sedentary jobs such as light housekeeper for hospitals and large office complexes, receptionist in hospital or medical complex, file clerk, motel clerk and self-service station attendant. (Tr. 49-51).

Claimant argues that she has a "seizure disorder" and is unable "to lift an item as heavy as a skillet" and is therefore not able to engage in any substantial gainful employment as described by Dr. Gordon.

The medical records do indicate that the combined effect of plaintiff's various impairments prevented her from

working between February 1976 and November 1977. However, the medical report from Dr. Rounsaville dated November 11, 1977, fully supports the Secretary's decision that plaintiff was not disabled after that date. The burden is clearly on the claimant to prove that her disability continued past the time of cessation found by the Secretary. Myers v. Richardson, 471 F.2d 1265 (6th Cir. 1972). The reports from Dr. David James which contain clinically unsupported opinions of continuing disability do not meet that burden.

The Secretary's decision recognizes that plaintiff's back problems might prevent her doing her customary work. However, the vocational expert's testimony supports the Secretary's conclusion that other lighter, more sedentary work exists in substantial numbers in the national economy which plaintiff did retain the capacity to perform. Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971).

The Secretary's decision indicates that he gave careful consideration to plaintiff's subjective complaints of pain, and resolved the issue against plaintiff. Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965). He also considered the opinion of plaintiff's doctor that plaintiff was still disabled, but accorded greater weight to the medical opinions which were supported by clinical and laboratory test results. Janka v. Secretary of Health, Education and Welfare, 589 F.2d 365 (8th Cir. 1978).

The Secretary's regulations vest discretion in the Administrative Law Judge to weigh physicians' conclusory opinions. 20 C.F.R. §404.1526; Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970). As trier of facts, it is the Secretary's responsibility to consider all the evidence, to resolve any conflicts in the evidence, and to decide the ultimate disability issue. Richardson v. Perales, 402 U.S. 389 (1971); Mayhue v. Gardner, 294 F.Supp. 853 (Kan. 1968), aff'd, 416 F.2d 1257 (10th Cir. 1969).

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as:

> "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co. 306 U.S. 292, 300 (1939), the Court, interpreting what consitutes substantial evidence, stated:

> "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Cellebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D.S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the act:

1. That the physical impairment has lasted at least twelve months that prevents her engaging in substantial gainful activity; and

2. That she is unable to perform or engage in any substantial gainful activity. 42 U.S.C. § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such findings are based upon the correct legal standards, it is the determination of the Court that Plaintiff is in fact not entitled to continued disability benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

Dated this 18th day of December, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

KENNETH MITCHELL,

Plaintiff,

v. No. 79-C-369-C

JOSEPH CALIFANO, JR., Secretary of Health, Education, and Welfare of the United States of America,

Defendant.

ORDER

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

At the time of the hearing on July 28, 1978 before the Administrative Law Judge, the claimant appeared personally and testified but was not represented by counsel (Tr. 20-44).

Following the hearing, on November 22, 1978, Terri Huval, Legal Advocacy Worker with Legal Services of Eastern Oklahoma, Inc., wrote the Appeals Council requesting leave to file additional medical evidence (Tr. 7-8). On January 2, 1979 the Appeals Council advised Ms. Huval that she should submit such additional evidence within 15 days. From the record it appears that no further response was received by the Appeals Council from Ms. Huval and on March 12, 1979 the Appeals Council notified the claimant that his request for review of the Administrative Law Judge's decision was denied (Tr. 3-4). In his brief filed herein on September 5, 1979, plaintiff's counsel attached as an exhibit progress notes of Dr. Gary Lee dated May 7, 1979 in which Dr. Lee

states that it is his opinion that claimant has not been able to work due to psychiatric problems since June of 1977. Dr. Lee states that it does not appear that claimant would be able to return to work in the foreseeable future "certainly not within the next one year (twelve months)." At page 98 of the transcript is a medical record dated July 25, 1977 in which Dr. Lee states that claimant in his opinion has not been able to work since June 1, 1977 and "is not able to work at this time." At the hearing plaintiff testified as to conversations that he had had with Dr. Lee concerning his psychiatric problems. The Administrative Law Judge in his decision found at pages 10 through 14 of the transcript makes no comment either with respect to plaintiff's testimony as to his conversations with Dr. Lee or Dr. Lee's opinion as to plaintiff's condition. At pages 92 and 93 of the transcript is a report dated August 30, 1977 of Dr. Ronald C. Passmore, a psychiatrist in which report Dr. Passmore evaluates plaintiff's condition as "Depressive reaction with considerable agitation. He appears to be disabled at this time. He needs medication. He is competent to handle any funds he might have. Also at page 87 of the transcript is a report from Dr. Kenneth B. Craig who examined the plaintiff on August 25, 1977 in which Dr. Craig states "The patient has an obvious psychiatric disorder which, I feel, overlays and seems to interfere with his functional capacity. I feel this in itself would probably keep him from being able to carry out his occupation." (Tr. 86-87) On pages 84 and 85 is a report dated August 1, 1977 of Dr. Robert A. Jordan in which Dr. Jordan states "I am really unable to decide at this point whether or not Mr. Mitchell is disabled, since many patients of this type of mine are still able to work."

Although the Appeals Council did advise plaintiff's counsel Ms. Huval that she would have 15 days to furnish

additional medical evidence, for some reason not apparent from the record such medical evidence was not supplied. Both Dr. Passmore and Dr. Craig's reports are supportive of Plaintiff's claim of disability, and it does appear that additional medical evidence of the plaintiff's treating psychiatrist, Dr. Lee, could be material to plaintiff's claim of disability.

IT IS, THEREFORE, ORDERED that this matter be and the same is hereby remanded to the Administrative Law Judge for the purpose of including in the record any additional medical evidence of Dr. Lee which plaintiff desires to offer.

Dated this 18th day of December, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES NEWBY,	)	
	)	
Plaintiff,	)	78-C-546-C
	)	
vs.	)	
	)	
JOSEPH CALIFANO, Secretary of Health, Education and Welfare,	)	
	)	
	)	
Defendant.	)	

ORDER

This action arose under 42 U.S.C. §405(g) which provides for judicial review of any final decision by the Secretary of Health, Education and Welfare. The review of the Court is limited to whether or not the decision regarding disability of the plaintiff is supported by substantial evidence in the record as a whole. "Substantial evidence", in turn, has been defined for the purpose of the Act as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). The Social Security Act does not authorize a trial de novo by the District Court.

The Administrative Law Judge considered the plaintiff's case de novo, and on September 1, 1978, found that plaintiff was not under a disability. The Appeals Council approved that decision on October 5, 1978.

Plaintiff is now before this Court, having filed objections to the Findings and Recommendations of the United States Magistrate, after oral argument, that Judgment be entered in favor of the defendant.

Plaintiff, a 58-year old man with a seventh grade education [a carpenter by trade], seeks disability benefits because of restriction in the use of his left leg and left hand as a result of injuries sustained in previous years. He sustained an on-the-job injury to his left leg in July of 1944, when he crushed said leg, and was off work for a period of some 3 years. About four years prior to applying for disability benefits, he broke his left arm. He was able to return to work and did work until December 23, 1977 [when his employer went out of business]. He worked 7 days and 5 hours since January 1, 1978, his last day having worked being March 8, 1978.

Plaintiff reported that his wife does everything around the house; that he watches television; that he visit relatives; and that he was able to drive a car (automatic only).

On March 27, 1978, the social security claims representative observed plaintiff and stated in his report that plaintiff walked very slowly and had difficulty standing. He could not use his left hand. He held his arm up to keep his hand elevated.

On May 15, 1978, plaintiff reported that he was unable to work on a ladder, or walk on a hillside or up and down banks. In addition, he stated he could not dig a hole, could not fish anymore, and mentioned when he went to Mexico he was not able to cast his rod.

Dr. W. F. Ewing, an internist, who last examined plaintiff on April 4, 1978, described his primary problem as decreased left wrist mobility, limited strength, and the inability to grasp objects securely and strongly. Plaintiff's left hand was cold and his thumb was numb. He smoked 1-1/2 packs of cigarettes per day and had a productive morning cough and was moderately short of breath.

In Dr. Ewing's report he stated:

> I believe him to be disabled from doing carpentry, and indeed a lot of things, becaus(sic) of the inability to grasp well with his left hand. He could do many things but he can't do carpentry.
>
> Also has definite restriction of his pulmonary function. He is a heavy smoker.

On three occasions pulmonary function studies showed an FVC of 74 with a 1 second of 80 percent or bette, but an MVV of 35 percent.

The Statement of Employment (TR-47) submitted by R. A. Turley Construction Company, reflected that plaintiff began working for said company on March 1, 1978 and the last date he worked was on March 8, 1978. The reason for termination was "job completed". It was further stated that he received no unusual assistance or supervision and that he performed the carpentry duties.

In a Vocation Report completed by the plaintiff on April 3, 1978, plaintiff stated:

> Have tools on a dolly so I don't have to lift it. I also have a door dolly that I made myself so I can carry doors. I can't even hang a door by myself because I have only one good arm.

The transcript reveals that plaintiff "waived his right to appear and present oral evidence at the hearing and requested a decision by the Administrative Law Judge on the evidence of record."

After his claim was denied by the Administrative Law Judge in his Request for Review of the Hearing Decision, plaintiff stated:

> I read in the judges decision that he says I can drive and visit relatives frequently. I have not left my house since Memorial Day. The only reason I drive is that I can't afford to take a cab.
>
> I haven't even been fishing because I can't hold a fishing rod.
>
> Bob Turley mentioned in the decision laid me off but hired somebody to replace me the day before he laid me off. (Dated 9/5/78).

The Administrative Law Judge found that "[C]laimant has failed to sustain the burden of establishing that he does have an impairment or combination of impairments of such severity as to prevent him from engaging in his normal work activity as a finishing carpenter."

At the time of filing his application for disability benefits plaintiff had satisfied the various procedural requirements of the Social Security Act, and in order to receive benefits there only remains the question whether plaintiff was disabled within the meaning of the Act.

42 U.S.C. §405(g) restricts judicial review stating: "The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive...."

The statutory definition of "disability" is contained in 42 U.S.C. §423(d) (1): "The term 'disability' means---(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months...." In subsection 2(A) of 42 U.S.C. §423(d) Congress elaborated on this definition saying, "an individual .... shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

The burden of proving disability by acceptable evidence rests with the plaintifff. 42 U.S.C. §423 (d)(5); Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970).

When a social security disability claimant makes a showing of his inability to return to his former type of work by reason of his impairments, that shifts to the Secretary the burden "of coming forward....with proof that there are substantial job opportunities in the national economy." Talifero v. Califano, 426 F.Supp. 1391 (USDC WD Mo. WD 1977); Meneses v. Secretary of Health, Education and Welfare, 143 U.S.App.D.C. 81, 442 F.2d 803 (1971); Lund v. Weinberger, 520 F.2d 782 (8th Cir. 1975); Garrett v. Richardson, 471 F.2d 598 (8th Cir. 1972).

The medical evidence in the instant case is uncontroverted that plaintiff is "disabled from doing carpentry".

42 U.S.G. §405(g) reads in part as follows:

> ....The Court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for rehearing.

It is noted that the power to remand granted by 42 U.S.C. §405(g) has frequently been exercised by Courts to remand cases to the Secretary for the purpose of clarifying the findings upon which his decision rests.

In Johnson v. Richardson, 486 F.2d 1023 (8th Cir. 1973) the Court said:

> It is true, as the district court recognizes, that the examiner, sitting as a trier of fact, may apply his experience and judgment in weighing the testimony of experts and draw fair and reasonable conclusions from the evidence. It is one thing for the examiner to infer that the overall evidence did not support the claimant's allegation of disability; however, it is another for the examiner to make that inference on his own determination that the claimant could serve in a specific vocation, when the only evidence in the record disputes it.
>
> Claimant urges that under the circumstances a vocational expert should have been called to assess and evaluate his capacity and ability to perform gainful employment. In Garrett v. Richardson, 471 F.2d 598, 603-604 (8th Cir. 1972) this court observed:
>
> > The burden of producing such a person must rest with the hearing examiner and in the absence of substantial evidence from other sources bearing directly on the issue of "substantial gainful activity," the testimony of a vocational counselor is essential for the affirmance of an examiner's findings.

This Court is aware that an Administrative Law Judge is not under an obligation or duty to call as a witness a vocational counselor in every Social Security case. This Court is also aware of the fact that the Administrative Law Judge, in the present case, found that the plaintiff was not disabled from returning to his prior employment. The Court is of the opinion that such finding by the Administrative Law Judge is not supported by substantial evidence. By so finding, this Court in no way infers that the plaintiff in the instant case is disabled within the meaning of the Act, but only that the record before this Court is inadequate as to the "ability-availabilty" standard substituted by Congress in the 1967 amendments. The Secretary is not required to find that a specific job opening is available to a claimant before denying disability benefits. Simmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975); Torske v. Richardson, 484 F.2d 59 (9th Cir. 1973), cert. denied, 417 U.S. 993, 94 S.Ct. 2646, 41 L.Ed.2d 237 (1974); Poore v. Matthews, 419 F.Supp. 142 (USDC Neb. 1976). The test is whether job exists for which a person with the plaintifff's condition and background can realistically compete, not whether specific job vacancies exist for which he might be hired. Trujillo v. Cohen, 304 F.Supp. 265 (D.Colo. 1969), aff'd. Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970).

Accordingly, the instant case should be remanded to the Secretary for clarification of the findings upon which his decision rests. The Secretary should specifically in further administrative proceedings, specify (1) Whether plaintiff is disabled or whether he is able to do some type of work which exists in the national economy although he is not able to return to his former work.

This case should be remanded to the defendant for further administrative proceedings consistent with this Order.

IT IS, THEREFORE, ORDERED that the Objections to the Findings and Recommendations of the Magistrate are sustained.

IT IS FURTHER ORDERED that this case be remanded to the defendant for further administrative proceedings consistent with this Order.

ENTERED this 18th day of December, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOE G. MEYERS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant and Third Party Plaintiff,

vs.

GARDNER BH CONSTRUCTORS, corporate successor to S.O.G. Research and Development Corporation,

Third Party Defendant.

No. 77-C-220-E

O R D E R

The Court has before it for consideration the United States' Motion to Dismiss and Plaintiff's Motion to Transfer. This is an action under the Federal Tort Claims Act.

Plaintiff alleges that he was injured while working on the Kaw Dam Project on the Arkansas River, because of the negligence of employees of the Corps of Engineers. Plaintiff was injured while working on a slot in the bulkhead, at the powerhouse structure of the dam, when a load of concrete was dropped on him.

Plaintiff, in his deposition filed September 19, 1979, stated that he now lives in Kay County, Oklahoma, and that he lived in Kay County at the time he was injured.

Appended to the United States' Motion to Dismiss is the affidavit of Jack L. Crawford, Chief of the Supervision and Inspection Branch, U. S. Army Corps of Engineers. Through this affidavit and the map which is attached to it, it appears that the bulkhead slots, the situs of Plaintiff's injury, are located in Kay County. The map discloses that the bulked slots are located approximately 400 to 450 feet west of the Kay County and Osage County border.

Title 28 U.S.C. §116 divides the State of Oklahoma into three judicial districts. While Osage County is encompassed by the Northern District, Kay County is part of the Western District.

Plaintiff, in his brief in support of his Motion to Transfer, states that this action was inadvertently brought in the Northern District because it was believed that the injury to Plaintiff occurred in Osage County. Plaintiff asks that this action be transferred to the Western District under 28 U.S.C. §1406(a).

Title 28 U.S.C. §1402(b) provides as follows:

> Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

Plaintiff does not reside within this District, nor did the injury occur within this District. Both the place of the injury and Plaintiff's residence are within the Western District. It is clear from 28 U.S.C. §1402(b) that this case properly should be before that Court.

The Court is, therefore, presented with a choice between dismissal or transfer. The characterization of §1402(b) as a venue statute or a jurisdictional statute will greatly influence which alternative is to be chosen.

The United States essentially contends that inasmuch as the Federal Tort Claims Act is a waiver of sovereign immunity, it must be strictly construed, and the requirements for prosecuting actions under it must be exactly complied with. Section 1402(b) in the view of the United States, goes to the power of the Court to entertain this type of action. Under this view, the United States District Court for the District in which either the Plaintiff resides or in which the act or omission occurred has exclusive jurisdiction over cases arising under the Federal Tort Claims Act. If this be so, the Court must dismiss this action for when subject matter jurisdiction is lacking, transfer under 28 U.S.C. §1406(a) is unavailable. See, e.g., Haire v. Miller, 447

F.Supp. 57 (N.D. Miss. 1977); Calzaturificio Giuseppe Garbuio, S.A.S., v. Dartmouth Outdoor Sports, Inc., 435 F.Supp. 1209, 1211 n.6 (S.D.N.Y. 1977); James v. Daley & Lewis, 406 F.Supp. 645 (D. Del. 1976); Raese v. Kelly, 59 F.R.D. 612 (N.D.W.Va. 1973); Annot., Improper Venue-Transfer of Cases, 3 A.L.R.Fed. 467, 496 (1970). See also Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962); United States ex rel. Ayala v. Tubman, 366 F.Supp. 1268 (E.D.N.Y. 1973). When it appears that the Court lacks subject matter jurisdiction, Rule 12(h)(3), Fed.R.Civ.P., requires dismissal.

On the other hand, if §1402(b) is a venue statute, the Court may, under 28 U.S.C. §1406(a) transfer the case to a District where venue is proper rather than dismiss it, if the interest of justice requires such transfer.

The question of whether 28 U.S.C. §1402(b) goes to jurisdiction or venue was noted by the Court in Buchheit v. United Air Lines, Inc., 202 F.Supp. 811 (S.D.N.Y. 1962), but the court concluded that it was not necessary that the issue be resolved under the circumstances of that case. In Abramovitch v. United States Lines, 174 F.Supp. 587 (S.D.N.Y. 1959) the court noted that the proposition that the provisions now contained in §1402(b) were jurisdictional was doubtful. 174 F.Supp. at 591. Although the United States' argument is intriguing, other courts have apparently treated 28 U.S.C. §1402(b) as a venue statute. See, e.g., United States Lines, Inc. v. United States, 470 F.2d 487 (Fifth Cir. 1972); Misko v. United States, 77 F.R.D. 425, 429 n.7 (D.D.C. 1978); Christopher v. United States, 237 F.Supp. 787, 800 (E.D.Pa. 1965); Nowotny v. Turner, 203 F.Supp. 802, 805 (M.D.N.C. 1962); Kalter v. Norton, 202 F.Supp. 950 (S.D. N.Y. 1962); Abramovitch v. United States Lines, supra.

The Court is of the opinion that 28 U.S.C. §1402(b) is a venue statute.

Title 28 U.S.C. §1406(a) provides that when venue is improper, the court shall "dismiss, or if it be in the interest of justice, transfer such case to any district ...

in which it could have been brought." There is no question that this action could have been brought in the District Court for the Western District of Oklahoma.

In the present case, the statute of limitations has run on Plaintiff's claim. In cases where dismissal because of improper venue would terminate an action without a hearing on the merits because the applicable statute of limitations had run, "the interest of justice" generally requires that the case be transferred. Burnett v. New York Central R.R. Co., 380 U.S. 424, 430 n.7 (1965); Goldlawr, Inc. v. Heiman, supra.

For the foregoing reasons, the Court concludes that this cause should be transferred to the United States District Court for the Western District of Oklahoma.

IT IS THEREFORE ORDERED that the Motion to Dismiss of Defendant, United States, be and the same hereby is denied.

IT IS FURTHER ORDERED that Plaintiff's Motion to Transfer be, and the same hereby is, granted. The Clerk of the Court is hereby directed to forthwith take the necessary actions to effect the transfer of this case to the United States District Court for the Western District of Oklahoma.

IT IS SO ORDERED this 18th day of November, 1979.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. GREGORY G. WICKLIFFE, LINDA L. WICKLIFFE, and ADMIRAL STATE BANK, a Corporation, Defendants.	)	CIVIL ACTION NO. 79-C-394-D

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 17th day of December, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; the Defendant, Admiral State Bank, appearing by its attorney, Joseph Q. Adams; and the Defendants, Gregory G. Wickliffe and Linda L. Wickliffe, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Gregory G. Wickliffe and Linda L. Wickliffe, were served by publication as shown on the Proof of Publication filed herein; and, that the Defendant, Admiral State Bank, was served with Summons and Complaint on June 1, 1979, as appears on the United States Marshal's Service herein.

It appearing that the Defendant, Admiral State Bank, has duly filed its Answer herein on July 5, 1979; and, that the Defendants, Gregory G. Wickliffe and Linda L. Wickliffe, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Rogers County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Five (5), Block Three (3), of Amended Plat of GREEN ACRES ADDITION, Rogers County, State of Oklahoma.

THAT the Defendants, Gregory G. Wickliffe and Linda L. Wickliffe, did, on the 4th day of April, 1977, execute and deliver to the United States of America acting through the Farmers Home Administration, their mortgage and mortgage note in the sum of $23,500.00 with 8 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Gregory G. Wickliffe and Linda L. Wickliffe, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $27,337.59 as unpaid principal with interest thereon at the rate of 8 percent per annum from October 23, 1979, until paid, plus the cost of this action accrued and accruing.

The Court further finds that Defendant, Admiral State Bank, is entitled to judgment against Defendant, Gregory G. Wickliffe, in the amount of $3,449.00 as of June 30, 1979, plus interest from said date at the rate of 15 percent per annum, an attorney fee in the amount of $516.35, plus any additional sums advanced or expended during this foreclosure action by the Defendant, Admiral State Bank, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Gregory G. Wickliffe and Linda L. Wickliffe, in rem, for the sum of $27,337.59 with interest thereon at the rate of 8 percent per annum from October 23, 1979, plus the cost of this action accrued and accruing, plus any additional sums advanced or to

be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, Admiral State Bank, have and recover judgment, in rem, against the Defendant, Gregory G. Wickliffe, in the amount of $3,449.00 as of June 30, 1979, plus interest from said date at the rate of 15 percent per annum, an attorney fee in the amount of $516.35, plus any additional sums advanced or expended during this foreclosure action by the Defendant, Admiral State Bank, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

HUBERT H. BRYANT
United States Attorney

BY: ROBERT P. SANTEE
Assistant United States Attorney

Joseph Q. Adams

JOSEPH Q. ADAMS
Attorney for Defendant,
Admiral State Bank

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 17 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

SKYMART AVIATION, INC., a Montana corporation, and NATIONAL AVIATION UNDERWRITERS, INC.,	)	
Plaintiffs,	)	
vs.	)	No. 76-C-416-E
AIR-KARE CORPORATION, an Oklahoma corporation,	)	
Defendant.	)	

JUDGMENT

This cause comes on for hearing this 3rd day of December, 1979, the plaintiffs, National Aviation Underwriters, Inc., and Skymart Aviation, Inc., appearing by and through their attorney of record, Gerald P. Green, and the defendant, Air-Kare Corporation, appearing by and through their attorney of record, Paul McBride, and both parties having announced ready for trial and presented their evidence, and both parties having rested their case, the cause was submitted to a jury, duly empaneled and sworn, and a verdict returned into open court on Tuesday, December 4, 1979 as follows:

> "We the jury find in favor of the plaintiffs and against the defendant in assessed damages in the sum of FIFTEEN THOUSAND AND NO/100 DOLLARS ($15,000.00), signed, William M. McKinney, Jr., Foreman."

And the court, having heard the evidence and reviewed the verdict of the jury finds that the same is in order and accepts the same;

IT IS THEREFORE, ADJUDGED AND DECREED, that the plaintiffs, National Aviation Underwriters, Inc. and Skymart Aviation, Inc., have and recover judgment over and against the defendant, Air-Kare Corporation, for their cause of action in the amount of FIFTEEN THOUSAND AND NO/100 DOLLARS

($15,000.00), the cost of this action, and interest thereon from the date of this judgment.

James O. Ellison, United States District Judge

APPROVED:

Paul McBride
Attorney for Defendant

Gerald P. Green
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT CROUT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIE JIM and RENA JIM, husband and wife; and AMERICAN FINANCE OF OKLAHOMA, INCORPORATED, a/k/a AMERICAN FINANCE SYSTEMS OF OKLAHOMA, INCORPORATED, Defendants.	)	CIVIL NO. 79-C-561-C

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 14th day of December, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendant, American Finance of Oklahoma, Incorporated, a/k/a American Finance Systems of Oklahoma, Incorporated, appearing by its attorney, Joseph Lapan, and the Defendants, Willie Jim and Rena Jim, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Willie Jim and Rena Jim were served with Summons and Complaint on October 29, 1979; and American Finance of Oklahoma, Incorporated, a/k/a American Finance Systems of Oklahoma, Incorporated, was served with Summons and Complaint on September 21, 1979, as appears from the United States Marshal's Service herein.

It appearing that the Defendant, American Finance Systems of Oklahoma, Inc., a/k/a American Finance of Oklahoma, Incorporated, has duly filed its Answer and Cross-Complaint herein on October 26, 1979; and that the Defendants, Willie Jim and Rena Jim, have failed to answer herein and that default has been entered by the Clerk of this Court.

Judgment Const. made

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> Lot Six (6), Block Eighteen (18), SUBURBAN HILLS ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Willie Jim and Rena Jim, did, on the 8th day of September, 1976, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of $9,250.00, with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Willie Jim and Rena Jim, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of $9,253.13, as unpaid principal with interest thereon at the rate of 9 percent per annum from January 1, 1979, until paid, plus the cost of this action accrued and accruing.

The Court further finds that defendant American Finance of Oklahoma, Incorporated, a/k/a American Finance Systems of Oklahoma, Incorporated, is entitled to judgment against defendants Willie Jim and Rena Jim by reason of a Second Real Estate Mortgage, dated March 11, 1977, filed March 17, 1977, in Book 4255, Page 45, records of Tulsa County, in the amount of $2,343.14, plus interest and attorney's fees as provided in said mortgage, plus accrued court costs, but that such judgment would be subject to and inferior to the first mortgage lien of the plaintiff herein.

The Court further finds that defendant American Finance of Oklahoma, Incorporated, a/k/a American Finance Systems of

Oklahoma, Incorporated, is entitled to judgment against defendants Willie Jim and Rena Jim by reason of a Second Real Estate Mortgage, dated November 4, 1977, filed November 10, 1977, in Book 4294, Page 821, records of Tulsa County, in the amount of $2,702.07, plus interest and attorney's fees as provided in said mortgage, plus accrued court costs, but that such judgment would be subject to and inferior to the first mortgage lien of the plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Willie Jim and Rena Jim, in personam, for the sum of $9,253.13, with interest thereon at the rate of 9 percent per annum from January 1, 1979, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that American Finance of Oklahoma, Incorporated, a/k/a American Finance Systems of Oklahoma, Incorporated, have and recover judgment, in personam against the defendants, Willie Jim and Rena Jim, in the amount of $2,343.14, plus interest and attorney's fees as provided in said mortgage, plus accrued court costs, as of the date of this judgment, but that such judgment is subject to and inferior to the first mortgage lien of the plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that American Finance of Oklahoma, Incorporated, a/k/a American Finance Systems of Oklahoma, Incorporated, have and recover judgment, in personam against the defendants, Willie Jim and Rena Jim, in the amount of $2,702.07, plus interest and attorney's fees as provided in said mortgage, plus accrued court costs, as of the date of this judgment, but that such judgment is subject to and inferior to the first martgage lien of the plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

UNITED STATES DISTRICT JUDGE

APPROVED

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

BY: ROBERT P. SANTEE
Assistant United States Attorney

JOSEPH LAPAN
Attorney for Defendant, American Finance Systems of Oklahoma, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

EDWIN C. MARQUISS,

Plaintiff,

vs.

YELLOW FREIGHT SYSTEM, INC., an Indiana Corporation; and TRANDS PERKINS,

Defendants.

No. 79-C-622-BT

ORDER

The Court has for consideration defendant's Motion to Transfer, and being fully advised, finds:

Plaintiff has joined with defendant in its request for transfer in order that this action may be consolidated with two companion cases now pending in the Western District of Oklahoma, styled Diana Lawson v. Yellow Freight, Inc., No. CIV-79-588-D and Lois Wooster v. Yellow Freight System, Inc., No. CIV-79-589-D. This case could properly have been brought in the Western District of Oklahoma. Therefore, this is a proper case for transfer under 28 U.S.C. §1404(a).

IT IS THEREFORE ORDERED the parties joint motion to transfer this case to the United States District Court for the Western District of Oklahoma is hereby sustained. The Clerk is directed to mail to the Court to which the case is transferred (i) certified copies of all docket entries in this case as well as a certified copy of this Order, and (ii) the originals of all other papers on file in the case.

ENTERED this 14 day of December, 1979.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANKLIN W. BENTON,

Plaintiff,

v.

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare of the United States of America,

Defendants.

No. 79-C-39-C

ORDER

The Court has for consideration Plaintiff's appeal from the decision of the Administrative Law Judge and has reviewed the file, the briefs and all of the recommendations, and being fully advised in the premises, finds:

That the case should be remanded to the Administrative Law Judge for the purpose of including in the record additional evidence to support the Administrative Law Judge's finding that the claimant has the vocational capabilities to engage in positions such as "salesman or order clerk which would make use of claimant's familiarity with lumber and hardwood products, a self-service station operator, security guard, and dispatcher. The current medical evidence does not suggest that claimant's physical condition has deteriorated to a point where he would be unable to perform any of the jobs mentioned by the vocational expert." (Tr. 14).

From the record it appears that the Administrative Law Judge relied upon the testimony of the vocational expert from a prior hearing on an earlier disability claim of the plaintiff conducted on May 18, 1976. (Tr. 14 and 117-119).

Although the Administrative Law Judge's decision dated June 17, 1976 is included in the record at Page 114 through 120 of the transcript, the testimony of the vocational expert, Mrs. Velva D. Lester, is not included. Customarily,

at the time the vocational expert testifies the vocational expert has the benefit of the medical evidence which is before the Administrative Law Judge as well as hearing all of the witnesses at the time of the hearing, from which evidence and testimony the vocational expert can then give an opinion as to what jobs, if any, claimant may be able to perform and whether or not such jobs exist in the national economy and available in reasonable proximity to the claimant's place of residence.

At the time of the August 17, 1978 hearing, the Administrative Law Judge considered additional medical evidence as well as other lay witness testimony which was not available for consideration by the vocational expert at the time of the prior hearing of May 18, 1976.

Some courts have held that when the record establishes that the claimant can do light or sedentary work that the Secretary may take administrative notice that light work existed in the national economy. See McLamore v. Weinberger, 538 F.2d 572 (4th Cir. 1976); Breaux v. Finch, 421 F.2d 687 (2nd Cir. 1970). However, in this case the Administrative Law Judge did not state that he was taking administrative notice that light work exists in the national economy but instead stated that he was relying on the testimony of the vocational expert from the hearing of April 17, 1975.

IT IS, THEREFORE, ORDERED that this matter be and is hereby remanded to the Administrative Law Judge for the purpose of taking the testimony of a vocational expert in support of his conclusions that there were jobs for which the claimant had the vocational capabilities to perform in the national economy.

Dated this 14th day of December, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and JIM CANTRELL, Revenue Officer, Internal Revenue Service, Petitioners,	)	
vs.	)	CIVIL NO. 79-C-111-C
CHARLES V. FETTER, JR., Respondent.	)	

ORDER DISCHARGING RESPONDENT
AND DISMISSAL

On this 14th day of December, 1979, Petitioners' Motion To Discharge Respondent And To Dismiss came on for decision and the Court finds that Respondent has now complied with the two Internal Revenue Service Summons served on December 16, 1978, that further proceedings herein are unnecessary, and that the Respondent, Charles V. Fetter, Jr. should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Respondent, Charles V. Fetter, Jr. be and he is hereby discharged from any further proceedings herein and this action be and the same hereby is dismissed.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FRANKLIN W. BENTON, Plaintinff,	)	
v.	)	No. 79-C-39-C
JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare of the United States of America, Defendants.	)	

ORDER

The Court has for consideration Plaintiff's appeal from the decision of the Administrative Law Judge and has reviewed the file, the briefs and all of the recommendations, and being fully advised in the premises, finds:

That the case should be remanded to the Administrative Law Judge for the purpose of including in the record additional evidence to support the Administrative Law Judge's finding that the claimant has the vocational capabilities to engage in positions such as "salesman or order clerk which would make use of claimant's familiarity with lumber and hardwood products, a self-service station operator, security guard, and dispatcher. The current medical evidence does not suggest that claimant's physical condition has deteriorated to a point where he would be unable to perform any of the jobs mentioned by the vocational expert." (Tr. 14).

From the record it appears that the Administrative Law Judge relied upon the testimony of the vocational expert from a prior hearing on an earlier disability claim of the plaintiff conducted on May 18, 1976. (Tr. 14 and 117-119).

Although the Administrative Law Judge's decision dated June 17, 1976 is included in the record at Page 114 through 120 of the transcript, the testimony of the vocational expert, Mrs. Velva D. Lester, is not included. Customarily,

at the time the vocational expert testifies the vocational expert has the benefit of the medical evidence which is before the Administrative Law Judge as well as hearing all of the witnesses at the time of the hearing, from which evidence and testimony the vocational expert can then give an opinion as to what jobs, if any, claimant may be able to perform and whether or not such jobs exist in the national economy and available in reasonable proximity to the claimant's place of residence.

At the time of the August 17, 1978 hearing, the Administrative Law Judge considered additional medical evidence as well as other lay witness testimony which was not available for consideration by the vocational expert at the time of the prior hearing of May 18, 1976.

Some courts have held that when the record establishes that the claimant can do light or sedentary work that the Secretary may take administrative notice that light work existed in the national economy. See McLamore v. Weinberger, 538 F.2d 572 (4th Cir. 1976); Breaux v. Finch, 421 F.2d 687 (2nd Cir. 1970). However, in this case the Administrative Law Judge did not state that he was taking administrative notice that light work exists in the national economy but instead stated that he was relying on the testimony of the vocational expert from the hearing of April 17, 1975.

IT IS, THEREFORE, ORDERED that this matter be and is hereby remanded to the Administrative Law Judge for the purpose of taking the testimony of a vocational expert in support of his conclusions that there were jobs for which the claimant had the vocational capabilities to perform in the national economy.

Dated this 14th day of December, 1979.

H. DALE COOK
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TECHNOTHERM CORPORATION,	)	FILED
Plaintiff,	)	DEC 13 1979
vs.	)	Jack C. Silver, Clerk U. S. DISTRICT COURT
J. J. WHITE POWER & PROCESS EQUIPMENT CO., a corporation,	)	
Defendant.	) No. 79-C-634-E	

ORDER GRANTING DEFAULT JUDGMENT

This matter comes on for hearing before the undersigned Judge of the above entitled Court on this 13th day of December, 1979. The Court being fully advised in the premises, finds:

1. Plaintiff filed its Complaint in this matter on October 9, 1979.

2. Defendant was duly served with Summons herein by certified mail as evidenced by the Return of the U. S. Marshal for the Northern District of Oklahoma.

3. Defendant has wholly failed, refused and neglected to plead or answer herein on or before the answer date, November 6, 1979, and plaintiff, therefore, is entitled to the entry of an order granting default judgment in the amount of $15,918.08, with interest thereon at 1-1/2% per month until date of judgment and interest at the amount of 10% per annum from the date of judgment; a reasonable attorney fee in the amount of $ 900.00, and the costs of this action, accrued and accruing, ~~which to date total $_____~~.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court that defendant is hereby adjudged to be in default.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that plaintiff, Technotherm Corporation, have and recover judgment against defendant, J. J. White Power & Process Equipment Co., a corporation, in the principal amount of $15,918.08, with interest thereon at 1-1/2% per month until the time of judgment, and the rate of 10% per annum from the date of judgment; a reasonable attorney fee in the amount of $ 900.00, together with the costs of the action, accrued and accruing, ~~which to date total~~ $_____.

S/ JAMES O. ELLISON

JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CLARENCE YOUNGWOLFE, PLAINTIFF,	)	
VS.	)	NO: 79-C-38-C
FIRST NATIONAL BANK, CLAREMORE, OKLAHOMA, DEFENDANT.	)	

DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff, Clarence Youngwolfe, and hereby dismisses his causes of action herein against the Defendant, First National Bank, Claremore, Oklahoma, with prejudice to future filing.

Clarence Youngwolfe
CLARENCE YOUNGWOLFE, Plaintiff

APPROVED AS TO FORM:

Joseph F. Lollman
JOSEPH F. LOLLMAN
Attorney for Defendant

Donald L. Henderson
DONALD L. HENDERSON
Attorney for Plaintiff

JACK FERGUSON
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROGER M. WHEELER,

Plaintiff,

vs.

RICHARD L. VOGEL, W. RANDOLPH WHEELER, and ANDREW A. LEVY,

Defendants.

No. 78-C-441-BT

ORDER

In the Complaint filed by Roger M. Wheeler he alleges on June 15, 1977, he and Phoenix Resources, Inc., (plaintiff owns a majority of the stock of Phoenix) entered into a "Shareholders Agreement" with Vogel concerning the purchase of Bessemer Iron and Coal Company. Plaintiff contends that the agreement provided that Vogel and Phoenix were to loan money to Bessemer Iron and Coal Company. Plaintiff further contends that W. Randolph Wheeler and Andrew A. Levy were in control of Bessemer Iron and Coal Company and that Vogel, W. Randolph Wheeler and Andrew A. Levy failed to perform specified obligations under the Agreement and mismanaged Bessemer causing Bessemer to be deprived of assets and loan proceeds.

The "Shareholders Agreement" provided that a company called Seneca Mining Corporation would be formed to hold title to certain mining equipment to be used with respect to the mining business of Bessemer. Bessemer's strip mining operations are located in Maryland. The Agreement further provided that New York law would govern the agreement. Paragraph 16 of the Agreement provided for submission of controversies arising out of the agreement for arbitration in New York.

In the First Cause of Action of the Complaint, plaintiff prays for an accounting, restitution, or alternatively for damages for breach of contract. In the Second Cause of Action plaintiff seeks damages for fraudulent inducement and misrepresentation.

Phoenix Resources, Inc., and Roger M. Wheeler have filed an action in the United States District Court for Maryland, being number M 79-784, styled "Phoenix Resources, Inc. and Roger M. Wheeler, Andrew A. Levy, R.L. Vogel, W. Randolph Wheeler, Andrew A. Levy, R.L. Vogel, Inc., and Seneca Mining Corporation." From the initial pleadings filed in the Maryland Court and brought to this Court's attention, it appears that the litigation in Maryland encompasses a stockholder derivative action. In the Maryland complaint it appears that Phoenix, in that action, seeks recovery on the following basis: (i) fraud; (ii) conspiracy; (iii) breach of contract; (iv) violation of fiduciary duties. Phoenix seeks an accounting monetary damages and injunctive relief. Mr. Roger M. Wheeler's action in the Maryland case is for breach of contract. He seeks monetary damages and injunctive relief. The Maryland litigation is based on the same transaction that is the basis for the litigation in this Court.

The defendant, Richard L. Vogel, has filed a Motion to Transfer to the United States District Court for the District of Maryland. The defendants, W. Randolph Wheeler and Andrew A. Levy, have filed a Motion to Transfer to the United States District Court for the District of Maryland. Both Motions assert 28 U.S.C. §1404(a) which provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district ... where it might have been brought."

The case in the Northern District of Oklahoma was commenced September 6, 1978. The case in the District of Maryland was commenced April 23, 1979.

It appears that the case in the Northern District of Oklahoma could have been instituted in the District of Maryland, but that the case in Maryland could not have been instituted in the Northern District of Oklahoma because of venue [all defendants named in the Maryland litigation could not be served in Oklahoma]. Hoffman v. Blaski, 363 U.S. 335, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960); Northwest Animal Hospital, Inc. v. Earnhardt, 452 F.Supp.191 (USDC WD Okl. 1977); Moore's Federal Practice, Vol. 1, ¶9.145[6.-1].

The citizenship of the parties litigant is as follows:

Roger M. Wheeler, Plaintiff	Tulsa, Oklahoma.
Richard L. Vogel, Defendant	Is alleged to be a citizen of New York in the complaint, but now states that he is a citizen of Maryland.
W. Randolph Wheeler, Defendant	New Jersey
Andrew A. Levy	New York.

The citizenship of parties identified in the "Shareholders Agreement" is as follows:

Roger M. Wheeler, Plaintiff	Tulsa, Oklahoma.
Phoenix Resources, Inc.	Organized in Delaware and principal place of business in Las Vegas, Nevada.
Richard L. Vogel, Defendant	Maryland as noted above.
R. L. Vogel, Inc.	New York corporation with principal place of business in New York.
Bessemer Iron and Coal Co.	Pennsylvania corporation with principal operations in Maryland.
Seneca Mining Corporation	Pennsylvania corporation, qualified to do business in Maryland.
James R. Clarke	Pennsylvania

The citizenship of witnesses identified by defendants (with a brief synopsis of their testimony:

Roger M. Wheeler, Plaintiff	Tulsa, Oklahoma.
Richard L. Vogel, Defendant	Maryland.
W. Randolph Wheeler, Defendant	New Jersey.
Andrew A. Levy, Defendant	New York.
Cheryl Hugenschmidt	Maryland.
Fred Crowley	Pennsylvania.
James Karsnak	Pennsylvania.

Plaintiff has asserted that he will have witnesses but he has not identified them.

It is urged by the defendants that the books records, documents and exhibits concerning Bessemer Iron and Coal Co. are located in Maryland.

A transfer under 28 U.S.C. §1404(a) lies within the discretion of the trial court. Wm. A. Smith Contracting Co. v. Travelers Indemnity Co., 467 F.2d 662 (10th Cir. 1972); Metropolitan Paving Co. v. International Union Of Operating Engineers, 439 F.2d 300 (10th Cir. 1971), cert. denied, 404 U.S. 829, 92 S.Ct. 68, 30 L.Ed.2d 58 (1971); Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145 (10th Cir. 1967).

The burden of establishing that this suit should be transferred is on the movants and unless the evidence and circumstances of the case are strongly in favor of the transfer, the plaintiff's choice of forum should rarely be disturbed. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947); Wm. A. Smith Contracting Co. v. Travelers Indemnity Co., supra; Texas Gulf Sulphur Co. v. Ritter, supra; Factors, Ec., Inc. v. Pro Arts Inc., 579 F.2d 215 (10th CCA 1978) cert. den. 99 S.Ct. 1215; Houston Fearless Corp. v. Teter, 318 F.2d 822 (10th Cir. 1963); Radiation Researchers, Inc. v. Fischer Industries, Inc., 70 F.R.D. 561 (USDC WD Okl. 1976); Vinita Broadcasting Co. v. Colby, 320 F. Supp. 902 (USDC ND OKL.1971).

The foremost factor militating against transfer, of course, is plaintiff's choice of this forum. B. J. McAdams, Inc. v.Boggs, 426 F.Supp. 1091, 1104 (USDC ED Pa. 1977). In deference to the paramount consideration of plaintiff's choice of a proper forum, transfer may only be granted if the defendants establish that the balance of interests is strongly in their favor. Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3rd Cir. 1970), cert. denied 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971).

A transfer is not appropriate if it would merely shift inconvenience from one party to another. Hess Oil Virgin Islands Corp. v. UOP, Inc., 447 F.Supp.381, 383 (USDC ND Okl. 1978).

The first factor for consideration under a 28 U.S.C. §1404(a) motion is the convenience of the parties. As noted above, a Court must give a large measure of deference to the plaintiff's freedom to select his forum and significant weight should be given to that choice. This factor alone, however, has minimal value when considered by itself.

In the instant case, plaintiff resides in this District; one of the defendants resides in New York; one defendant resides in New Jersey and one defendant resides in Maryland Regardless of the district in which this action lies, one of the parties will be inconvenienced. The Court therefore finds no compelling argument has been made by plaintiff or the defendants as to which district is more convenient for the parties.

The Court notes, however, that it would be more convenient for defendants to try the instant case in Maryland in view of the litigation presently pending in Maryland as noted hereinabove. Fluor Corp. v. Pullman, Inc., 446 F.Supp. 777 (USDC ND Okla. 1977)

The second factor to be considered is the convenience of the witnesses. The defendants, W. Randolph Wheeler and Andrew A. Levy, have attached to their Motion to Transfer an affidavit of their local counsel listing seven witnesses (four of whom are parties litigant), showing the state of residence and the nature of their testimony. Plaintiff, on the other hand, has only alluded to the fact that he will have witnesses without identifying them or delineating the nature of their testimony. Of the witnesses identified, only the plaintiff resides within this District.

This Court is aware that it is the nature of the witnesses' testimony rather than the number which is important. It appears, however, the testimony in person of at least some of these listed witnesses would be essential to the determination of the issues involved. The Court is aware that compulsory process in the District of Maryland would only apply to one of the witnesses identified by the defendants. The Court finds, however, that even if these witnesses for defendants should voluntarily agree to testify, it would be much more convenient because of their proximity for them to testify in Maryland. A party should not be forced to rely on "trial by deposition" rather than live witnesses. B.J. McAdams, Inc. v. Boggs, 426 F.Supp. 1091 (USDC ED Pa. 1977).

The Court finds the defendants have furnished the Court with sufficient information establishing the present forum would be inconvenient to the great majority of the material witnesses listed. The Court concludes that the convenience of the witnesses in this action would favor the transfer of this case to the District of Maryland.

The third factor for consideration by the Court is the "interest of justice." Under this standard the Court should consider the relative ease of access to sources of proof; availability of compulsory process for attendance of willing witnesses and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; and all other practical factors that make trial of a case more expeditious and less expensive. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 389, 91 L.Ed. 1055 (1947); Chicago, Rock Island and Pacific Railroad Co. v. Igoe, 220 F.2d 299 (7th Cir. 1955), cert. denied, 350 U.S. 822, 76 S.Ct. 49, 100 L.Ed. 735 (1955).

There are several factors involved in this action which would favor a transfer to the District of Maryland.

First, a trial in Maryland would facilitate easy access to the sources of proof.

Second, a trial in Maryland would involve far less expense in obtaining the attendance of willing witnesses and would allow compulsory process to issue, if necessary, for one of defendant's listed witnesses.

Third, there is a pending law suit in the United States District Court for the District of Maryland arising out of the same transaction that precipitated this litigation. In Continental Grain Co. v. The FBL-585, 364 U.S. 26, 89 S.Ct. 1470, 4 L.Ed.2d 1540, Justice Black stated in dictum:

> "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to a wastefulness of time, energy and money that §1404(a) was designed to prevent. ..."

See also Kisko v. Penn Central Trans. Co., 408 F.Supp. 984 (USDC MD Pa. 1976); Pesin v. Golman Sachs & Co., 397 F.Supp. 392 (USDC SD NY 1975); Azriel v. Frigitemp Corp., 397 F.Supp. 871 (USDC ED Pa. 1975); Hall v. Kittay, 396 F.Supp. 261 (USDC Del. 1975); Leonhart v. McCormick, 395 F.Supp. 1073 (USDC WD PA. 1975).

The rule in this Circuit is that the first suit should have priority, " 'absent the showing of balance of convenience in favor of the second action' ....unless there are special circumstances, which justify giving priority to the second." Factors Etc., Inc. v. Pro Arts, Inc., supra, 579 F.2d 215, 218 (10th Cir. 1978).

The Supreme Court has articulated the test to be "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation...." Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952); Factors Etc., Inc. v. Pro Arts, Inc., supra, 579 F.2d 215, 218 (10th Cir. 1978).

In the instant case plaintiff has instituted two suits, one in the Northern District of Oklahoma [which is first in time] and a second suit in the District of Maryland. In weighing all the factors in favor of transfer, the Court concludes that the interest of justice will be served by such a move for the reasons hereinabove delineated.

The Court should comment on plaintiff's Motion to Amend Complaint prior to entering this transfer order.

The Court notes that the instant action was commenced in this Court on September 6, 1978, and as noted hereinabove, the Maryland action was commenced on April 23, 1979. The Motion to Transfer of Richard L. Vogel was filed on July 25, 1979. The Motion to Transfer of W. Randolph Wheeler and Andrew A. Levy was filed on July 31, 1979. Plaintiff's Motion to Amend was filed on October 10 1979. In the brief in support of said Motion plaintiff states that Richard L. Vogel has not answered and that pursuant to Rule 15, F.R.Civ.P., no leave is required to amend as to him. Plaintiff further states that W. Randolph Wheeler and Andrew A. Levy have answered and that the plaintiff seeks leave of the Court to amend.

The Court notes in paragraph 5 of said brief:

> "5. The proposed amended complaint incorporates an allegation of intentional fraud and asks for punitive damages to serve as a deterrent upon these defendants. This amendment is based on the same facts that gave rise to the original complaint..." (Emphasis supplied)

It is sound practice to make a transfer motion at an early time (the litigation in Maryland was commenced April 23, 1979) and undue delay is not encouraged. 1 Moore's Federal Practice, ¶.145[4.-3].

The file reveals that the defendants have not unduly delayed in asserting their right to transfer.

By transferring this case the following motions are transferred for dispositive ruling by the United States District Court for Maryland:

(i) Motion to Compel Arbitration and Stay of Defendants, Wheeler and Levy;

(ii) Plaintiff's Motion to Amend.

Accordingly, defendants' Motions to Transfer this case to the United States District Court for the District of Maryland are hereby sustained. The Clerk is directed to mail to the Court to which the case is transferred (i) certified copies of all docket entries in this case as well as a certified copy of this Order, and (ii) the originals of all other papers on file in the case.

IT IS SO ORDERED.

ENTERED this 13TH day of December, 1979.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MILDRED E. ABEL, Plaintiff, v. OTIS ELEVATOR COMPANY, a corporation, Defendant.	)	No. 78-C-360-~~B~~

STIPULATION OF
D I S M I S S A L

COMES NOW the plaintiff, MILDRED E. ABEL, and hereby dismisses the above cause with prejudice against the defendant OTIS ELEVATOR COMPANY.

MILDRED E. ABEL

BY _____
Louis W. Bullock
Chapel, Wilkinson, Riggs,
Abney & Keefer
502 W. Sixth
Tulsa, OK 74119

Attorneys for Plaintiff

_____
Mildred E. Abel

OTIS ELEVATOR COMPANY,
a corporation

BY _____
John F. McCormick, Jr.
2200 Fourth National Bldg.
Tulsa, OK 74119

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

THOMAS A. SMITH, et al., Plaintiffs,	)	
vs.	)	No. 78-C-214-C
WILLIAM A. SKAIFE, et al., Defendants.	)	

FILED
DEC 13 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

NOTICE OF DISMISSAL WITH PREJUDICE

Plaintiffs, Thomas A. Smith, a/k/a Tom Smith, and Debbie K. Smith, a/k/a Debbie Smith, d/b/a Springtime Flowers of Tulsa, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, dismiss the causes of action set forth in the Complaint and Amended Complaint filed in this case against William A. Skaife, Margaret Skaife, Anything Groes Corporation, an Iowa corporation, and Springtime Flowers Corporation, an Iowa corporation, with prejudice to their right to refile any action based on or relating to the circumstances and events set forth in those pleadings.

Dated this 11th day of December, 1979.

APPROVED BY THE COURT:

HONORABLE H. DALE COOK
CHIEF U.S. DISTRICT JUDGE

THOMAS A. SMITH, individually and
d/b/a Springtime Flowers of Tulsa

DEBORAH K. SMITH, individually and
d/b/a Springtime Flowers of Tulsa

This Notice of Dismissal with Prejudice is approved by the undersigned, attorney for Plaintiffs, who releases the Attorney's Lien claimed on the Petition and Amended Petition filed in this case.

JAMES R. LLOYD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PHOENIX MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

-vs-

EVA IRENE SAUNDERS and WILLIAM JOHN PATRICK SAUNDERS, a minor,

Defendants,

and

MEGHAN ALLEN SAUNDERS, a minor,

Additional Defendant.

No. 79-C-346-C

JOURNAL ENTRY OF JUDGMENT

The Court has before it the Joint Application of Plaintiff and Defendants filed herein on the 11th day of December, 1979. The Court finds that the matters requested therein should be granted, and IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff, Phoenix Mutual Life Insurance Company, is hereby dismissed as a party to this litigation.

2. Plaintiff is further discharged from all further liability under the policy which is the subject matter of this action, including any liability for interest subsequent to the date of the filing of the Complaint herein.

3. Defendants, Eva Irene Saunders, Meghan Allen Saunders and William John Patrick Saunders, and each of them, are hereby permanently restrained and enjoined from instituting or prosecuting any proceeding in any state or United States court seeking recovery under the policy which is the subject matter of this action.

4. The Clerk of this Court is hereby ordered to withdraw the funds previously invested with the Merrill Lynch Ready Assets Trust and to disburse those funds to Defendants as follows:

NAME	SHARE OF FUNDS TO BE DISBURSED
Eva Irene Saunders	25.0%
Eva Irene Saunders, as guardian of Meghan Allen Saunders	37.5%
Patricia Saunders Fike, as guardian of William John Patrick Saunders	37.5%

5. The Clerk of the Court is further ordered to deliver the foregoing checks to Defendants' attorney, Fred J. Cornish, Hall, Estill, Hardwick, Gable, Collingsworth & Nelson, 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma, 74172, for delivery by him to the Defendants.

DATED this 12 day of December, 1979.

S/ THOMAS R. BRETT

JUDGE THOMAS R. BRETT

APPROVAL AS TO FORM:

RICHARD B. NOULLES
Attorney for Plaintiff

FRED J. CORNISH
Attorney for
EVA IRENE SAUNDERS,
MEGHAN ALLEN SAUNDERS and
WILLIAM JOHN PATRICK SAUNDERS

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DAIRY PRODUCTS INTERNATIONAL, LTD.,

Plaintiff,

vs.

ZENTRALSCHWEIZERISCHER MILCHVERBAND LUZERN (M.V.L.),

Defendant.

No. 79-C-402-C

FILED
DEC 12 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

NOW on this 12 day of Dec., 1979, the Court has for its consideration the Stipulation for Dismissal jointly filed in the above styled and numbered cause by the plaintiff and the defendant. Based upon the representations and requests of the parties, as set forth in the foregoing Stipulation, it is

ORDERED that the plaintiff's complaint against the defendant and the defendant's counterclaim against the plaintiff be and the same are each hereby dismissed with prejudice, and that each party bear its own costs and attorneys' fees herein.

James O. Ellison
United States District Judge

APPROVED:

WHITEBOOK, KNOX, HOLTZ & HARLIN
1700 Fourth National Building
Tulsa, Oklahoma 74119

PRAY, WALKER, JACKMAN, WILLIAMSON
& MARLAR
2200 Fourth National Building
Tulsa, Oklahoma 74119

By Floyd L. Walker
Floyd L. Walker

Attorneys for Plaintiff DAIRY PRODUCTS INTERNATIONAL, LTD.

JAMES L. KINCAID
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Attorneys for Defendant
ZENTRALSCHWEIZERISCHER
MILCHVERBAND LUZERN (M.V.L.)

OF COUNSEL:

CONNER, WINTERS, BALLAINE, BARRY
& McGOWEN
2400 First National Tower
Tulsa, Oklahoma 74103
Telephone: (918) 596-5711

IN THE UNITED STATED DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD E. CARTWRIGHT,

Plaintiff,

vs.

JOSEPH CALIFANO, Secretary of Health, Education and Welfare,

Defendant.

CIVIL ACTION NO. 79-C-121-C

STIPULATION FOR DISMISSAL

It is hereby stipulated by Plaintiff and Defendant that the above-entitled action be dismissed (without prejudice).

Dated December 11, 1979.

UNITED STATES DISTRICT JUDGE

Approved as to form and content:

Mitchell E. Shamas
Attorney for Plaintiff

Eleanor Worden Thompson
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OWEN GEORGE SHORT, Plaintiff,	)	
vs.	)	No. 79-C-436-C
T. JACK GRAVES, et al., Defendants.	)	

ORDER

The plaintiff herein has brought two causes of action against the defendants. His First Cause of Action is brought pursuant to Title 42, United States Code, Sections 1983 and 1985. In his Second Cause of Action, the plaintiff alleges that certain defendants published libelous statements about him. Now before the Court is the defendant Glen "Pete" Weaver's motion to dismiss the Second Cause of Action for lack of subject matter jurisdiction; the motion of the defendants Weaver and Al Boyer to dismiss the First Cause of Action for failure to state a claim; the defendant T. Jack Graves' motion to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim; and the defendant John Mahoney's motion to dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim.

MOTIONS TO DISMISS
FIRST CAUSE OF ACTION

The defendant Graves is the District Attorney of Mayes County, Oklahoma. The defendant Mahoney was a legal intern employed in the office of District Attorney Graves. The defendant Weaver is the Mayes County Sheriff, and the defendant Boyer is one of his deputies. On April 17, 1979, Mahoney, acting under the direction of Graves, caused an information to be filed against the plaintiff charging him

with a felony charge of perjury, in violation of the laws of the State of Oklahoma.

In the First Cause of Action, the plaintiff generally alleges that Mahoney had reason to know and the facilities to determine that the perjury charge was false, and that Graves knew the charge was false. The filing of the charge is alleged to be part of a conspiracy among the defendants which was initiated by the defendant Weaver instructing the defendant Boyer to prepare an allegedly false affidavit upon which the charge filed against the plaintiff was based. The alleged object of the conspiracy was to reap vengeance upon the plaintiff for giving testimony favorable to the accused in the case of State v. Gene Leroy Hart, Nos. 77-131, 132, 133, in the District Court of Mayes County, Oklahoma and to "intimidate the plaintiff and others from testifying adversely to the interests of the defendants and to prejudice the rights of future accuseds."

In support of their motions to dismiss as they apply to the First Cause of Action, Graves and Mahoney contend that they are entitled to absolute immunity from liability for the acts alleged therein. The defendants rely primarily on Imbler v. Pachtman, 424 U.S. 409, (1976), where the Supreme Court held "that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983." 424 U.S. at p.431. The plaintiff argues that the defendants Graves and Mahoney are not entitled to such absolute immunity for their acts.

In Imbler, the Supreme Court recognized the distinction between a prosecutor's "quasi-judicial" functions, and his administrative or investigative functions and confined their holding to situations where a prosecutor is acting in his "quasi-judicial" capacity. 424 U.S. at pp. 430-1. The plaintiff refers the Court to the case of Hampton v. City of

Chicago, 484 F.2d 602 (7th Cir. 1973), where it was held that two prosecutors who allegedly participated in the planning and execution of a raid in order to obtain evidence of criminal activity were not thereby acting in their quasi-judicial role. 484 F.2d at pp.608-9. The plaintiff contends that Graves' participation in the alleged conspiracy began before the charge itself was initiated, when he would likewise be acting as an administrator or investigative officer. However, the plaintiff has not alleged such participation by Graves in his Complaint. Furthermore, in Imbler, the Court noted that there is no such clear dividing line between the prosecutorial functions. The Supreme Court would not approve a flat statement that a prosecutor is not immune for any actions taken before a charge is initiated. 424 U.S. at p.431, n.33.

Plaintiff also refers to his allegations of the wrongful motivation of Graves in filing the charge in opposition to Graves' claim of immunity. It is clear, however, that the alleged motive of a prosecutor is not relevant to the immunity question. The analysis must focus on the defendant's conduct, rather than his alleged motivation. Hampton, supra, at p.608. See also Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975); Powell v. Seay, 553 P.2d 161 (Okla. 1976).

Finally, with respect to the defendant Graves, the plaintiff would have the Court adopt the reasoning of Justice White in his concurring opinion in Imbler. The plaintiff contends that in allowing the activities directed against the plaintiff to go forth when Graves knew they were groundless, Graves thereby violated the provisions of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a situation which Justice White explicitly sought to exempt from the generalized immunity of Imbler. The majority could not accept the fine distinctions urged by Justice White in his opinion. Justice White would have granted absolute

immunity where a prosecutor had willfully used perjured testimony, but only qualified immunity where he had willfully suppressed exculpatory information. 424 U.S. at p.431-2, n.34. This Court agrees with the assessment of the majority and therefore declines to adopt the reasoning of Justice White.

This Court has previously held that the filing of an information by a prosecutor comes within his quasi-judicial role for which the Supreme Court in Imbler provided absolute immunity. Atkins v. Lanning, 415 F.Supp. 186, 189 (N.D.Okla. 1976), aff'd. Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977). The defendant Graves must likewise be accorded immunity in the case at bar, and the plaintiff has therefore failed to state a claim against Graves under Section 1983.

The plaintiff contends that the defendant Mahoney is not entitled to immunity because, as a legal intern, he was acting beyond the scope of his official duties in performing the acts alleged in the First Cause of Action.

The plaintiff cites 22 O.S. §303, which requires the county attorney (now district attorney) to subscribe his name to informations filed in the various state courts. By judicial decision, the signature of a duly appointed and qualified assistant on behalf of the county attorney is sufficient. See, e.g. Tiller v. State, 35 Okla.Cr. 31, 247 P.421 (1926). The information that was filed against the plaintiff was signed by Mahoney as a legal intern on behalf of District Attorney Graves. The plaintiff has provided the Court with an excerpt of proceedings in the District Court of Mayes County, Oklahoma, where Judge Williams held that the signing of an information by a legal intern is not sufficient to comply with 22 O.S. §303. State v. Paine, No. CRF-79-66 (Sept. 18, 1979). The plaintiff therefore contends that Mahoney could not legally file the information against him.

The most obvious defect with the plaintiff's argument is that the legal authority he cites only relates to the signing of an information. There is no authority that proscribes the filing of an information by a legal intern. On the contrary, the Rules of the Supreme Court of the State of Oklahoma on Legal Internship permit a legal intern employed by a district attorney's office to "conduct all stages of the prosecution of a person charged with a felony to the trial . . ." 5 O.S. Ch.1, App.6 §7(C)(1).

Furthermore, the Court is not entirely satisfied with the correctness of Judge Williams' conclusion that the signature of a legal intern would not satisfy the requirements of 22 O.S. §303. The Court must agree with the plaintiff that a legal intern at present is not a person technically authorized to sign an information. He is not a county or district attorney and he does not meet the qualifications to be an "assistant district attorney". 19 O.S. §215.15. However, Oklahoma law does permit a legal intern to be a "part-time assistant" to a district attorney, Id., and the signing of an information by a legal intern in a district attorney's office on behalf of the district attorney certainly does not disserve the purpose of Section 303 which is "to give an official character to all prosecution and to insure that the prosecution is being conducted in good faith and not the work of private persons." (Citation omitted) Coffer v. State, 508 P.2d 1101, 1103 (Okla. 1973).

Prosecutors are entitled to immunity even though they may act in excess of their jurisdiction, so long as they do not act "'clearly outside their jurisdiction'". (Citations omitted) Gockley v. VanHoove, 409 F.Supp. 645, 650 (E.D.Pa. 1976). See also Clark v. Zimmerman, 394 F.Supp. 1166 (M.D.Pa. 1975) The defendant Mahoney was not clearly acting outside his jurisdiction.

Applying the "function" analysis of immunity, the defendant Mahoney was clearly acting in a quasi-judicial role in filing the information against the plaintiff. In Atkins v. Lanning, supra, this Court held that two investigators employed by a district attorney would not be entitled to immunity because this would be too great an extension of that narrowly-applied principle. 415 F.Supp. at p.189. On appeal, the Tenth Circuit expressed some disagreement with that conclusion. The court noted that "[a]s to the district attorney's investigators, it would hardly seem reasonable to exculpate the district attorney and to not immunize his underlings." 556 F.2d at p.489. The court noted the lack of discretion possessed by an investigator directly employed by a district attorney and his inextricable ties to the "quasi-judicial process of initiating, preparing, and presenting a case . . ." 556 F.2d at pp.488-9. A legal intern in a district attorney's office is even more "inextricably tied to the quasi-judicial process . . ." The Court finds that it would be unreasonable to immunize a district attorney and then to refuse to immunize a legal intern who was acting under the direction and supervision of the district attorney.

The defendant Mahoney is also entitled to a prosecutor's absolute immunity from liability, and the plaintiff has therefore failed to state a claim against him under Section 1983.

The defendants Weaver and Boyer do not cite any authority specifically in support of the dismissal of plaintiff's claims against them under Section 1983. They contend that because the plaintiff has alleged a "conspiracy", the plaintiff must be relying entirely on Section 1985. Weaver and Boyer argue that the plaintiff has failed to state a claim against them under Section 1985 because 1.) his allegations

of conspiracy are vague and conclusory, and 2.) there are no allegations of a racial or otherwise class-based invidiously discriminatory animus behind the actions of the alleged conspirators.

The Court must agree with the second contention of Weaver and Boyer. Such allegations are required to state a claim under Section 1985 because that Section is intended to safeguard the equal protection of the laws or equal privileges and immunities under the laws. Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 388 (1971). The constitutional right that the plaintiff has been deprived of, if any, is the right to due process. Section 1985(3) does not cover conspiracies to deny due process. Atkins v. Lanning, 415 F.Supp. 186, 187-8 (N.D.Okla. 1976). The plaintiff has therefore failed to state a claim against any of the defendants under Section 1985.

However, by pleading a "conspiracy" to deprive one of constitutional rights, one is not limited to Section 1985. There may also be a cause of action for conspiracy under Section 1983. See Mosher v. Saalfeld, 589 F.2d 438 (9th Cir. 1978); Hazo v. Geltz, 537 F.2d 747 (3rd Cir. 1976); Mizell v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970). As with Section 1985, more than vague conclusory allegations are required to state a claim. Mosher v. Saalfeld, supra, at p.441. The complaint must state "with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy." Slotnik v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977). The Court cannot, however, agree with the first contention of Weaver and Boyer that the plaintiff's allegations of conspiracy are vague and conclusory. He has alleged specific facts which show "the existence and scope of the alleged conspiracy." Id.

The defendants Weaver and Boyer allege two miscellaneous grounds in support of their motion to dismiss the First

Cause of Action. They submit that in the First Cause of Action plaintiff essentially seeks redress for injury to his reputation or for defamation, which is not a ground for relief under the Civil Rights Acts. The Court disagrees with this analysis of the First Cause of Action. If plaintiff's First Cause of Action must be placed in a neat category, it could be classified as an action for malicious prosecution.

In Atkins v. Lanning, this Court sought to determine the proper elements of a Section 1983 action based upon malicious prosecution. The elements were drawn from state law and the common law and are generally these: 1.) A prosecution was commenced against the plaintiff; 2.) The prosecution was initiated as the result of the malice or gross negligence of the defendant; 3.) The prosecution was without probable cause and was initiated primarily because of a purpose other than bringing the offender to justice; 4.) The prosecution was legally and finally terminated in plaintiff's favor. 415 F.Supp. at pp.190-2. The plaintiff has alleged all of these elements.

Finally, Weaver and Boyer claim immunity. Generally, sheriffs enjoy a qualified immunity from liability in a Section 1983 suit -- the sheriff must have acted in good faith. See Stephenson v. Gaskins, 539 F.2d 1066 (5th Cir. 1976); Hazo v. Geltz, supra. There are instances where a sheriff may act as an adjunct of the judiciary, and when this has occurred, courts have held that the sheriff may be absolutely immune from liability for such actions. See Hazo v. Geltz, supra; Raitport v. Provident Nat'l Bank, 451 F.Supp. 522 (E.D.Pa. 1978); Martinez v. Commonwealth, 435 F.Supp. 1204 (D.P.R. 1977); Havelone v. Thomas, 423 F.Supp. 7 (D.Neb. 1976). The Court cannot determine from the allegations of the First Cause of Action whether Weaver and

Boyer would be entitled to immunity. This contention demands further factual development.

MOTIONS TO DISMISS
SECOND CAUSE OF ACTION

The defendants Weaver and Graves contend that plaintiff's Second Cause of Action should be dismissed for lack of subject matter jurisdiction.

The plaintiff alleges that the Court has diversity jurisdiction over his Second Cause of Action under Title 28, United States Code, Section 1332. That Section provides in pertinent part as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --
> (1) citizens of different States;
> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

The plaintiff and the defendants Graves, Weaver, and Boyer are all alleged to be citizens of the State of Oklahoma. The defendant Mahoney is alleged to be a "resident" of the State of Missouri. For diversity jurisdiction to exist, there must be "complete" diversity, that is, the citizenship of all parties on one side of the case must be diverse to those on the other side. See, e.g. United Nuclear Corp. v. Moki Oil & Rare Metals Co., 364 F.2d 568 (10th Cir. 1966). Since complete diversity is not alleged by the plaintiff, the Court does not have jurisdiction over his Second Cause of Action under Section 1332.

The Court is not aware of any other basis for subject matter jurisdiction over the Second Cause of Action. Pendent jurisdiction is the closest alternative. The starting point for determining the existence of pendent jurisdiction is the case of United Mine Workers of America v. Gibbs, 383 U.S.

715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

> Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S. Const., Art. III, §2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole. (Citation and footnotes omitted) 383 U.S. at p.725.

In the case at bar, plaintiff's First and Second Cause of Action do not "derive from a common nucleus of operative fact". Plaintiff's First Cause of Action alleges a conspiracy to deprive the plaintiff of his constitutional rights through the instigation of a malicious prosecution. The First Cause of Action presents a substantial federal claim over which the Court has subject matter jurisdiction. The Second Cause of Action, however, purports to be a claim under state law for defamation.

In Wilder v. Irvin, 423 F.Supp. 639 (N.D.Ga. 1976), the court was presented with a claim under Sections 1983 and 1985 alleging a denial of due process for the failure of the defendants to afford the plaintiff a hearing prior to issuing a notice of ejectment from the Atlanta Farmers' Market. The plaintiff joined a claim of malicious prosecution and false imprisonment under state law arising from his arrest for criminal trespass when he returned to the Farmers' Market to sell produce after he had been evicted. The court noted that both claims derived from the same event, but emphasized that the state and federal claims presented entirely different elements of proof and theories of recovery. 423 F.Supp. at

p.643. The court further held that

> [a]lthough there is some overlap among the federal and state claims in the instant action, such overlap is not considerable. A trial on the state claim would inject new issues and a large amount of facts unrelated to the other portion of the case involving the federal claim. The state claim will certainly not be proven by the evidence that will be offered on behalf of the federal claim. The subject matter of the state and federal claims are not closely enough related and the Court finds that a "common nucleus of operative facts" does not exist. 423 F.Supp. at p.643.

Similar problems are presented by the instant case. The two causes of action arise out of the same event, that is the giving of testimony by the plaintiff at the Hart trial, but there are facts unique to each cause of action which do not overlap. Furthermore, the state and federal claims present different elements of proof and theories of recovery. The Court may not therefore exercise pendent jurisdiction over plaintiff's Second Cause of Action.

The defendant Mahoney urges the Court to dismiss the Second Cause of Action for failure to state a claim against him. In light of the Court's finding that it lacks subject matter jurisdiction over the Second Cause of Action, this contention need not be considered.

For the foregoing reasons, it is therefore ordered that the motions of the defendants T. Jack Graves and John Mahoney to dismiss the Complaint and the motion of the defendant Glen "Pete" Weaver to dismiss the Second Cause of Action are hereby sustained. It is further ordered that the motion of the defendants Glen "Pete" Weaver and Al Boyer to dismiss the First Cause of Action is hereby sustained in part and overruled in part. Accordingly, the plaintiff's Second Cause of Action is hereby dismissed; the Section 1985 claim under his First Cause of Action is hereby dismissed; and his Section 1983 claim under his First Cause of Action is hereby dismissed as to the defendants T. Jack Graves and John Mahoney.

It is so Ordered this 11th day of December, 1979.

H. DALE COOK
Chief Judge, U. S. District Court

ABM:wm

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HARLEY RICHARD COLE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
	)	
STATE OF OKLAHOMA, et al.,	)	
	)	
Defendants.	)	No. 78-C-465-B D

ORDER OF DISMISSAL

This December 10th, 1979, upon Application of attorney for plaintiffs, it appearing that the controversey between the parties having been fully resolved and settled, it is the Order of this Court that plaintiffs' Complaint as amended and the relief sought therein are hereby dismissed.

JUDGE
United States District Court
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BARBARA ANN MAGGARD,

Plaintiff,

vs

CHEMICAL EXPRESS CARRIERS, INC., a corporation, and PROTECTIVE INSURANCE CO., a corporation,

Defendants.

No. 78-C-390-B

FILED
DEC 7 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

This matter came on for consideration on this 7th day of December, 1979, upon the Joint Application For Dismissal With Prejudice filed herein. The Court being duly advised in the premises, finds that said application for dismissal is in the best interests of justice and should be approved and the above styled and numbered cause of action dismissed with prejudice to a refiling.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Joint Application For Dismissal With Prejudice by the parties be and the same is hereby approved and the above styled and numbered cause of action and Complaint is dismissed with prejudice to a refiling.

S/ THOMAS R. BRETT

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

APPROVED:

Jay C. Baker, Attorney for Plaintiff

Donald Church, Attorney for Defendants

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 77-C-461-E

KATHLEEN N. RUSSELL

vs.

JEREMIAH FAGAN and
ARMOUR and COMPANY

JUDGMENT

This action came on for trial before the Court and a jury, Honorable JAMES O. ELLISON, , United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiff.

It is Ordered and Adjudged that having found in favor of the Plaintiff and against the defendants assesses damages in the sum of $12,000.00.

FILED
DEC 7 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 7th day of December, 1979.

Clerk of Court

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JAMES RUSSELL

Plaintiff,

CIVIL ACTION FILE NO. 77-C-508-E

vs.

JUDGMENT

JEREMIAH FAGAN, and
ARMOUR and COMPANY,

Defendants.

This action came on for trial before the Court and a jury, Honorable JAMES O. ELLISON , United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the defendants.

It is Ordered and Adjudged that the Plaintiff taking nothing.

FILED
DEC 7 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 7th day of December, 1979.

Clerk of Court

RDW/sr

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH L. COOPER, JR., and RUTH A. COOPER, Husband and Wife,	)	
Plaintiffs,	)	
vs.	)	No. 79-C-144-~~B~~E
WYNELL JEAN READ,	)	
Defendant.	)	

ORDER OF DISMISSAL

ON this 6th day of December, 1979, upon the written application of the parties for a Dismissal With Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiffs filed herein against the Defendant be and the same hereby is dismissed with prejudice to any future action.

JUDGE, UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

FRANK GREER

Attorney for the Plaintiffs

KNIGHT, WAGNER, STUART & WILKERSON
Richard D. Wagner

Attorney for the Defendant

JUDGMENT ON JURY VERDICT CIV 31 (7-63)

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 77-C-264-C

CHARLES FULTON,

Plaintiff,

vs.

JUDGMENT

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,

Defendant.

This action came on for trial before the Court and a jury, Honorable H. DALE COOK, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the Plaintiff, Charles Fulton, recover judgment from the Defendant, St. Louis-San Francisco Railway Company, in the amount of $125,000.00, and that the Plaintiff be awarded his costs of action.

FILED

DEC 5 1979

Jack C. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 5th day of December, 1979.

Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HYDRO CONDUIT CORPORATION, a Delaware corporation,	)	
Plaintifff,	)	
vs.	)	
JAMES W. MILLER, d/b/a Miller Construction Company, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation,	)	
Defendants,	)	
vs.	)	No. 76-C-154-D
THE CITY OF BROKEN ARROW, OKLAHOMA,	)	
Defendant and Third Party Plaintiff,	)	
vs.	)	
BENHAM-BLAIR & AFFILIATES, INC., a Delaware corporation, d/b/a W. R. Holway and Associates,	)	
Third Party Defendant.	)	

JOURNAL ENTRY OF JUDGMENT FOR ACTION BY PLAINTIFF HYDRO CONDUIT CORPORATION AND AGAINST JAMES W. MILLER, d/b/a Miller Construction Company, and UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation

This action came on for consideration before the undersigned Judge of the United States District Court for the Northern District of Oklahoma. Plaintiff Hydro Conduit Corporation ("Hydro Conduit") is represented by its attorneys, John S. Athens and Bob F. McCoy of Conner, Winters, Ballaine, Barry & McGowen; Defendant James W. Miller, d/b/a Miller Construction Company ("Miller") and Defendant United States Fidelity and Guaranty Company, a Maryland corporation ("USF&G") are represented by David H. Sanders and Philip McGowan of Sanders, McElroy & Carpenter; Defendant and Third Party Plaintiff The City of Broken Arrow, Oklahoma (the "City") is represented by F. A. Petrik and Ray H. Wilburn; and Third Party Defendant Benham-Blair & Affiliates, Inc., a Delaware corporation, d/b/a W. R. Holway

and Associates, is represented by Harry M. Crowe of Crowe & Thieman and Don Hopkins of Hopkins, Warner & King.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Plaintiff Hydro Conduit and against Defendants Miller and USF&G, jointly and severally, in the sum of $44,949.39 for principal, plus $28,453.96 for interest computed at eighteen percent (18%) per annum from the date unpaid amounts became past due through November 8, 1979, plus $30,000.00 for attorney fees and all costs of this action, together with interest at the rate of eighteen percent (18%) per annum on the total of said amounts ($103,403.35 plus costs) from November 8, 1979 until paid.

Dated this 4th day of December, 1979.

Judge of the United States
District Court for the Northern
District of Oklahoma

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LUMBERMENS MUTUAL CASUALTY COMPANY,	)	
Plaintiff	)	
vs.	)	No. 78-C-558-C
JAMES S. HOAGLAND AND HARRY J. HOAGLAND,	)	
Defendants	)	
PAUL E. NEELY d/b/a NEELY INSURANCE AGENCY,	)	
Third-Party Defendant	)	

ORDER DISMISSING THIRD-PARTY ACTION WITHOUT PREJUDICE

This cause came on to be heard on Third-Party Plaintiffs' application for a voluntary dismissal of the Third-Party cause without prejudice. The Court, after due deliberation and being fully advised in the premises, finds that said cause should be dismissed without prejudice.

It is hereby ordered that Defendants' Third-Party action against Paul E. Neely d/b/a Neely Insurance Agency be and the same is hereby dismissed without prejudice.

Dated: December 6, 1979.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

VANDERSONS CORPORATION, an Illinois corporation,	)	
Plaintiff,	)	
vs.	)	No. 79-C-113-B
MANESS TYPE CO., INC., an Oklahoma corporation; THOMAS R. ELLIOTT and JOE E. BROWN,	)	
Defendants.	)	

ORDER OF JUDGMENT

Pursuant to a "Stipulation of Dismissal" and a "Joint Stipulation and Motion for Judgment" filed herein jointly by all of the parties hereto, it is hereby ordered and adjudged:

1. That this action shall be and it is hereby, dismissed with prejudice as to the defendants Joe E. Brown and Thomas R. Elliott.

2. That the plaintiff Vandersons Corporation shall recover of the defendant Maness Type Co., Inc. the sum of $78,961.98 together with interest thereon at the rate of 12% per annum as provided by the Security Agreement which forms the subject matter of this action and the costs herein expended by plaintiff.

Dated this 3RD day of December, 1979.

S/ THOMAS R. BRETT

United States District Judge

APPROVED AS TO FORM
AND CONTENT:

Gene C. Buzzard
ATTORNEY FOR PLAINTIFF

Mack Greever
ATTORNEY FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JERRY L. ROGERS, a minor, by his father and next friend, BILLY JOE ROGERS,

Plaintiffs,

vs.

BOARD OF EDUCATION OF WYANDOTTE OKLAHOMA SCHOOL DISTRICT, Lee Jeffery, Robert Wilson, Betty Fields, Dan Leisure, Jerry Strait, Ellen Gourd, and Richard Roark,

Defendants.

FILED
DEC 3 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

No. 78-C-221-C

ORDER

Now on this 3rd day of December, 1979, upon the joint application and stipulation of the plaintiffs and defendants to dismiss the above entitled action and for good cause shown, the Court finds and

IT IS ORDERED BY THE COURT that the above styled and captioned cause should be and the same is dismissed without prejudice.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

RDW/sr

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROBERT P. LEGG,

Plaintiff,

vs.

CIMARRON INSURANCE CO., INC., a Kansas corporation,

Defendant.

No. 78-C-555-BT

FILED
DEC 3 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON this 3RD day of December, 1979, upon the written application of the parties for a Dismissal With Prejudice of the Complaint and all causes of action, the Court having examined said Application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same hereby is dismissed with prejudice to any future action.

S/ THOMAS R. BRETT

JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:
PAUL McTIGHE, JR.

Attorney for the Plaintiff
KNIGHT, WAGNER, STUART & WILKERSON
RICHARD D. WAGNER

Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE NORTHWESTERN BANK, GEORGE A. MORETZ AND HELEN S. MORETZ, As Executors of the Estate of O. LEONARD MORETZ, Deceased, Plaintiffs, vs. CUSTOM BRICK COMPANY, OKLAHOMA STEEL CASTINGS COMPANY, an Oklahoma Corporation, UNION NATIONAL BANK OF CHANDLER, An Oklahoma Corporation, Defendants. THE BRICK TRUST., An Express Trust, Plaintiff, vs. GEORGE A. MORETZ, Defendant.	)	No. 79-C-142-C

FILED
DEC 3 1979
Jack C. Silver, Clerk
U. S. DISTRICT COURT

ORDER

This matter having come on to be heard this 3rd day of December, 1979, the court finds good cause exists for granting said motion.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED That the above styled matter is hereby dismissed with prejudice to further action.

H. Dale Cook
Judge

20

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL G. MOORE a/k/a MICHAEL GARY MOORE, Defendant.	)	CIVIL ACTION NO. 79-C-651-C

DEFAULT JUDGMENT

This matter comes on for consideration this 3rd day of December, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Michael G. Moore a/k/a Michael Gary Moore, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Michael G. Moore a/k/a Michael Gary Moore, was personally served with Summons and Complaint on October 18, 1979, and that Defendant has failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that the time within which the Defendant could have answered or otherwise moved as to the Complaint has expired, that the Defendant has not answered or otherwise moved and that the time for the Defendant to answer or otherwise move has not been extended, and that Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Michael G. Moore a/k/a Michael Gary Moore, for the sum of $1,926.81, as of July 16, 1979, plus interest from and after said date at the rate of 7% per annum.

H. Dale Cook
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

JACK A. AIRD, dba AIRD INSURANCE AGENCY, and AIRD INSURANCE COMPANY, a Utah corporation, Plaintiffs -v- ILIFF AIRCRAFT AND REPAIR SERVICE CO., INC., an Oklahoma corporation, Defendant.	Civil No. 78-C-1-B ORDER DENYING MOTION FOR DIRECTED VERDICT, FOR NEW TRIAL, FOR JUDGMENT NOTWITHSTANDING THE VERDICT

On the 25th day of July, 1979, in the above-entitled matter, the jury returned a verdict in favor of the plaintiffs and against the defendant and awarded the palintiffs $20,000. At the conclusion of the evidence the defendant made a motion for a directed verdict which the court took under advisement. After the trial the defendant made a motion a for a new trial and for judgment nothwithstanding the verdict. The plaintiffs have responded to the motions and have filed their own memorandum. The court has read the materials presented and is ready to rule.

Under the circumstances the trial court in considering the motion for judgment notwithstanding the verdict must examine the evidence in a light most favorable to the plaintiff with the reasonable inferences to be drawn therefrom. This is essentially the same standard that should be applied in connection with the consideration of the motion for directed verdict. In a Tenth Circuit case speaking clearly on this matter, Swearngin v. Sears Roebuck & Company, 376 F.2d 637, 639 (10th Cir. 1967), quoting Christopherson v. Humphrey, 366 F.2d 323 (10, 1966), the court said:

> (A) scintilla of evidence is not sufficient to justify submitting a case to the jury, a verdict may not be directed unless the evidence points all one way and is susceptible of no reasonable inferences which sustain the position of the party against whom the motion is made.

Other authorities are similarly cited.

All of this emphasizes the importance to be given to the decision of the jury in carrying out its role as the finder of the facts. Consequently, whatever be the opinion of the trial judge, if in the opinion of the trial judge the evidence which the jury considered is susceptible of reasonable inferences drawn by the minds of the jurors as reasonable persons that would support the verdict as rendered, then the trial court has no right to inject its own opinion or to in any way modify or change the decision of the jury.

Suffice it to say that as noted in the review of the evidence by the plaintiffs' brief, there were facts received in evidence, which while they may be subject to different interpretation based upon the weight which an individual might give to the evidence, nevertheless are of such a nature that the court cannot say that the evidence, if believed, would not justify a conclusion such as the jury came to. The court believes that based upon such reasoning the jury could well have come to the conclusion, reasonably, that there was evidence that showed the breach of the contract between the parties by the defendant. In particular, the claim of improper repairs, overall failure to inspect repairs following completion and the quality of workmanship. Certainly there was evidence that the unduly long delay may well have been the cause of damage to the plaintiffs. Reasonable minds could have concluded that the delay was unnecessarily long and the result of the fault of the defendants and/or its agents in respect to the breaches noted.

While the evidence with respect to the damages which the plaintiffs alleged resulted from the claimed breaches of the

contract and the faulty workmanship of the defendants was admittedly imprecise in many particulars, much of it came in without objection. Though based in important respects upon the personal opinion of the chief officer of the plaintiffs' company, it was nonetheless before the court to be weighed and considered. The items of damage detailed by the plaintiffs' chief officer in the brief of plaintiffs' counsel, and noted in the transcript, show that there was evidence before the jury which reasonably could have caused the jury to reach the verdict which it did of damages in the sum of $20,000.

With respect to the question of the competency of the plaintiffs' key witness, the court felt that he was a competent person to provide the opinions which he gave and that the argument of incompetence, both in law and fact, was not persuasive. The weight to be given to it was a proper subject for argument, but again, it was such as to justify the jury's extending to it a sufficient measure of belief to support the verdict rendered.

From all of the foregoing, the court determines that the following order should be entered:

IT IS HEREBY ORDERED that the motions of the defendant for directed verdict, for judgment notwithstanding the verdict, and for a new trial be, and they are hereby, denied.

DATED this 27 day of November, 1979.

ALDON J. ANDERSON, Chief Judge,
United States District Court